

THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, }
Editor.

ST. LOUIS, FRIDAY, JULY 14, 1876.

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Contributing Editor.

Current Topics.

THE SUPREME COURT OF MISSOURI.—Both political parties in Missouri will soon have an opportunity to demonstrate whether they are in favor of real reform. One of the most pernicious ideas prevailing American politics is that the judiciary should be recruited solely from the party in power. Judge Wagner of the Supreme Court of Missouri was a republican in politics when he took his seat on that bench twelve years ago. We do not wish to disparage the merits of any of the other judges of that court, when we say that no judge of equal ability has sat upon that bench for many years. We shall watch with curiosity to see whether the democratic convention, which meets next week at Jefferson City, will verify its professions of being a party of reform, by re-nominating a judge who has served the state so ably and so well, and whose only disqualification before that convention can be, that he did not, when he first took his seat on that bench, belong to the party now in power. We make bold to say that that court is in no condition to lose the services of such a judge at this time, and that if its character for ability and learning is much further diminished, it will cease to command the respect of the bar. Political caucuses have not of late been very successful in this state in presenting fit candidates for seats on the bench; the question of geographical location has generally had more to do with the selection of the candidate than his intrinsic qualifications, and we trust that the convention named will see the necessity of giving to this matter their earnest attention. We take it for granted that the coming republican state convention will re-nominate Judge Wagner, or at least recommend that the party vote be cast in his favor, should he run as an independent candidate.

THE "TWO ORPHANS" CASES.—Another decision has just been rendered in the matter of the play entitled "The Two Orphans." This case has been litigated in most of the large cities, from the Atlantic seaboard to the Mississippi valley, and has now been decided upon its merits in the United States Circuit Court for the District of Massachusetts, by Mr. District Judge Lowell, Mr. Circuit Judge Shepley concurring. The style of the case in that court was Orlando Tompkins v. Arthur McKee Rankin *et al.* According to a brief report of the decision which we find in the *Boston Advertiser*, the bill set forth, among other things, that in 1873 Adolph D'Ennery and Eugene Cormon were the authors of the play in the French language; that they agreed to convey to N. Hart Jackson the right to produce the play in the United States and to translate and adapt the play to the American stage, and joint authors of the translation, and Jackson to be sole author of any adaptation that might be made of the play; that Jackson adapted the play to the American stage, and it has been performed in New York and had become popular; that the right to this play was assigned to the plaintiffs, Shook and Palmer; that on February 1, 1875, the translation was copyrighted, and the plaintiff, Tompkins, the manager of the Boston theatre, purchased the right of exclusive representation in the city of Boston; that the defendant, Rankin, who was a dramatic artist, and actor, was formerly engaged at Union Square theatre in New York at the time of the original production of the play, and became then familiar with it; that Rankin and the other defendants, who were proprietors of the Howard Athenæum, had combined together to reproduce the drama in violation of the plaintiffs' right. The plaintiffs asked that the

defendants might be enjoined from publishing or performing the play, and from advertising such performance. The defendants in their answer denied that the plaintiffs had any valid copyright, in that they had not complied with the conditions of the copyright act. They further said that the play was translated into English by John Oxenford of England, and was acted in London; that in August, 1875, Rankin purchased the Oxenford translation of Henry Neville in London, which translation was prior in point of time to that of Jackson; that Rankin had the lawful right to produce the play; that Jackson's version was not identical with this, and that it is the translation of Oxenford, and not of Jackson, that it is proposed to produce at the Howard. Upon the title page of the Jackson translation the notice of the copyright is as follows:

"Entered according to the act of Congress in the office of the librarian of Congress, by N. Hart Jackson, as author aforesaid, and the copyright thereof duly assigned to Sheridan Shook and Albert M. Palmer as proprietors thereof. 1875."

There was now a hearing upon a motion for a temporary injunction. The judge, after consulting with Judge Shepley, announced his decision. It was held that the entry on the title-page of the Jackson translation, taken in connection with the figures "1875," which were at the bottom of the title-page in the place where the date of publication usually appears, was not a compliance with either form of requirement of section 1, chapter 301, 18 Statute at Large, part 3. That section is as follows: "That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book, the following words:

"Entered according to the act of Congress, in the year —, by A B, in the office of the librarian of Congress, at Washington;" or at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A B."

The injunction was accordingly denied. T. W. Clark, for the plaintiffs, and S. J. Thomas and A. Russ, for the defendants.

CONSTRUCTION OF CONTRACTS.—The case of Baker *et al.*, Assignees of the Odorless Rubber Company v. White, decided at the last term of the United States Supreme Court, illustrates the duty of courts to read and construe written contracts in the light thrown on them by surrounding circumstances. The facts were as follows: The Odorless Rubber Company, being in an embarrassed condition, undertook to relieve itself by obtaining additional subscriptions to its capital stock. It was conceived that in order to do this it was necessary that those holding the existing stock should submit to a reduction of its par value, as it was not really worth par at that time, and new subscribers could not be expected to take a stock which they knew to be below the value they were to pay for it. Accordingly, at a meeting of the stockholders, it was voted that, "whereas the capital stock of this company now issued, and the assets of the same, have become impaired to the extent of thirty per cent. on the whole amount of said stock, to wit, the sum of seventy-two thousand dollars and fifty cents, therefore, voted, that stock to the amount of \$72,112.50 be called in and cancelled upon the books of this company." At a former meeting it had been resolved that the capital stock of the company be increased to \$200,000, or

eight thousand shares. The defendant, after these resolutions had been adopted, signed the following instrument, and set opposite his name two hundred and forty, as the number of new shares for which he subscribed:

"We, the undersigned, hereby agree to take the number of shares of the capital stock of the Odorless Rubber Company placed opposite our respective names, and pay for the same as follows, to wit: six dollars and twenty-five cents per share whenever cash subscriptions to the amount of one hundred and eighteen thousand dollars shall have been made, and the balance in equal monthly instalments of ten per cent. each from the date of June 1st, A. D. 1872. Said stock to be fully paid whenever 85 per cent. of the par value shall have been paid into the treasury of the company, it being understood that none of said subscriptions shall be valid or obligatory until at least said amount of one hundred and eighteen thousand dollars of stock shall have been subscribed as aforesaid, and that 30 per cent. deduction is made on the old stock of this company, as per vote of stockholders. "He was elected a director and acted as such for a short time, and paid his instalments regularly, until he had paid \$2,700. He then refused to pay any more, and the corporation having been adjudged bankrupt, the plaintiffs, as assignees, brought the present suit to recover the unpaid instalments, amounting to \$3,300. The defendant insisted that one of the conditions on which he agreed to pay was that 30 per cent. of the old stock was to be deducted or extinguished, and this had not been done. The counsel for plaintiffs in error construed the paper as if it read thus: "It being understood that none of the subscriptions shall be valid or obligatory until at least said amount of one hundred and eighteen thousand dollars of stock shall have been subscribed as aforesaid, and it being also understood that 30 per cent. deduction is made on the old stock of this company, as per vote of stockholders, June 10, 1872." Reading it thus, they argued that the last clause, relating to the thirty per cent. deduction, was only a representation of what was understood to be an existing fact, at the time it was made, and not a condition like the one as to the amount of stock to be taken, without which the subscription was not obligatory.

In delivering the opinion of the court, Mr. Justice Miller, said: "It is possible so to construe the language of the instrument, if the surrounding circumstances demanded it. But to one who saw the paper for the first time, and knew nothing more, it would seem a forced and not a natural construction. If the word 'that' just before '30 per cent.' were omitted in the original, the plain grammatical meaning would be that the subscriptions were only obligatory in case the \$118,000 of stock was subscribed, and 30 per cent. of the old stock called in or deducted. We can not give to the use of the word 'that' such force as to destroy the natural and reasonable meaning which the sentence would have without it. But when, leaving grammatical and verbal criticism, we look to the admitted surrounding circumstances of the case, what was meant is quite clear. The paper bears the same date as the resolution to reduce the stock. That resolution did not profess to have the effect of reducing the stock of itself, but only declared that \$72,112.50 of said stock be called in. A thing to be done in future. And the bill of exceptions shows that the directors accordingly made an effort to get the stockholders to surrender and cancel stock to that amount, but failed to get it done. When a subscriber put his name to the agreement to take the new stock, the obtaining of the \$118,000, on which his subscription depended for its validity, was a thing to be accomplished in the future. And so, on the 10th day of June, the date of this paper, a subscriber looking to these two things promised, but yet to be performed, said 'I subscribe, but it is upon condition that I am only to be liable when they are performed, that is, when 118,000 new stock

is subscribed, and when 30 per cent. of the old stock is called in and cancelled as per resolution of the company of this date.'"

As it was not proved or asserted that this stock ever was so reduced, the defendant was not liable on that contract.

Opinions of Non-Professional Witnesses.

The Supreme Court of New Hampshire in the case of *Hardy v. Merrill* 56 N. H. 227, has recently delivered an elaborate judgment on the above question, overruling three former decisions of that state: *Boardman v. Woodman*, 47 N. H. 120; *State v. Pike*, 49 N. H. 399; and *State v. Archer* 54 N. H. 468; and holding that non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testators appearance and conduct.

In England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent, that it seems no English lawyer has ever presented to any court any objection, question or doubt in regard to it. In the ecclesiastical courts, where questions of testamentary capacity are generally tried, such opinions have always been received. See 1 Gr. Ev. (12th ed.), sec. 440, n. 4; *Dow v. Clark*, 3 Addams, 79; *Wheeler v. Alderson*, 3 Hagg. 574, where Sir John Nicholl said, in pronouncing his judgment,—"There is a cloud of witnesses who gave unhesitating opinions that the deceased was mad." The practice in the courts of common law has been universal and unwavering in the same direction; and "the number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised." *State v. Pike* 49 N. H. 409. In the year 1800, James Hadfield was tried for shooting at King George III. The defence was insanity, and the opinions of non-expert witnesses were freely admitted—27 State Trials 1281, *et seq.*—and Mr. Erskine told the jury they "ought not to be shaken in giving full credit to the evidence of those who * * * describe him as discovering no symptoms whatever of mental incapacity or disorder." Erskine's Speeches (3d London ed.) 132, 140. In *Eggleton v. Kingston*, 8 Ves. Jr. 450, Ann Boak and Elizabeth Banson "expressed a strong opinion of the total incapacity of the deceased, both from his great imbecility of mind and the dominion * * of Mrs Kingston;" and John Fogg testified that "his faculties were very much impaired." In *Love v. Jolliffe*, 1 W. Black. 365, the subscribing witnesses to a will having sworn that the testator was utterly incapable of making such an instrument—to encounter this evidence the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity. In *Tatham v. Wright*, 2 Russ. & Mylne, not fewer than sixty-one witnesses deposed to the state of the testator's intellect and the powers of his mind in early life. Without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of questions arising every day and in every judicial enquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. See, in addition to the American cases cited by Judge Doe, in *State v. Pike*, *passim*, and the cases cited by the learned counsel for the appellant, in argument, *Commonwealth v. Dorsey*, 103 Mass. 412; *McIntyre v*

McConn, 28 Iowa 480, 483; Dickinson v. Dickinson, 61 Pa. St. 404; Boyd v. Boyd, 66 Ibid. 283, 286, 290; Pidcock v. Potter, 68 Ibid. 351; 1 Wharton's Cr. Law, sec. 48. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions. But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard, or proposition, let them be content to adopt a formula like this: *Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained.* No harm can result from such a rule, properly applied. It opens a door for the reception of important truths which would otherwise be excluded, while, at the same time, the tests of cross-examination, disclosing the witness' means of knowledge, and his intelligence, judgment, and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury to form a due estimate of its weight and value. See 1 Redf. on Wills 136-141.

Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity—Commonwealth v. Sturtevant, 117 Mass.; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it can not be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. DeWitt v. Barley, 17 N. Y. 340; Taylor v. Grand Trunk Railway, 48 N. H. 309. "It is on this principle," says Mr. Best, "that testimony to character is received; as where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath." Best on Ev. 657. "So," continues Mr. Best, "the state of an unproducible portion of *real* evidence—as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository—may be explained by a term expressing a complex idea, *e. g.*, that it looked old, decayed or fresh; was in good or bad condition, etc. So, also, may the emotions or feelings of a party whose psychological condition is a question. Thus, a witness may state as to whether, on a certain occasion, a party looked pleased, excited, confused, agitated, frightened, or the like." In *Rutherford v. Morris*, Chicago Leg. News, Dec. 11, 1875, the Supreme Court of Illinois received the opinions of sixty common-sense witnesses, neighbors of the testator, in preference to those of experts, Judge Breese, remarking: "We feel confident that we will be more likely to arrive at a just estimate of the mental condition and business capacity of the testator by relying on the accordant testimony of his life-long acquaintances and neighbors, with whom the testator was in frequent intercourse, rather than from the testimony of these medical gentlemen; and so would the jury."

A non-expert may testify that he thought a horse "was not then sound: * * his feet appeared to have a disease of long standing"—*Willis v. Quimby*, 31 N. H. 485, 487; that a horse "appeared to be well, and free from disease;" that he thought he "never saw any indication of the horse being diseased"—*Spear v. Richardson*, 34 N. H.; *State v. Avery* 44 N. H. 392, and cases cited. See also *People v. Eastwood*, 14 N. Y. 562, where it was held that opinions as to whether a person is intoxicated may be received; *Milton v. Rowland*, 11 Ala. 732—opinions as to the existence of disease, when perceptible to the senses; *Bennett v. Fail*, 26 Ala. 605—opin-

ion that a slave appeared to be healthy. A non-expert may give his opinion on the physical health of a man, as well as on the physical health of a horse—*State v. Knapp*, 45 N. H. 148, 150; may give his opinion not only that a horse did not appear to be frightened, but also that a lady did not seem to be frightened or excited—*Taylor v. Railway*, 48 N. H. 304, 306, 309. The opinion of non-experts in relation to mental condition is not limited to the question of a mental disturbance caused by fright. In *Bradley v. Salmon Falls Manuf'g Co.*, 30 N. H. 487, 491, it was held that a non-expert might testify that the plaintiff "seemed satisfied" with a business arrangement proposed to him by the witness. In *McKee v. Nelson*, 4 Cow. 355, it was held that, in an action for a breach of promise of marriage, a witness, who knew the plaintiff, and had observed her conduct and deportment towards the defendant, was permitted to express his opinion that the plaintiff was sincerely attached to the defendant,—"a fact," said Judge Selden, "which it is plain could be proved in no other way;" and this decision was cited as undoubted law by Judge Parker, in *Robertson v. Stark*, 15 N. H. 114, 115. In *McKee v. Nelson*, the court say,—"There are a thousand nameless things, indicating the existence and degree of the tender passion, which language can not specify"—precisely what Judge Bellows, in *Whittier v. Franklin*, said of the frightened mental condition and sulky disposition of a horse.

Chief Justice Foster concludes his opinion in the case under consideration as follows: "It would be superfluous for me to add that I fully concur in the views and opinions expressed by Judge Doe in *Boardman v. Woodman* and *State v. Pike*, and that I cordially endorse the remarks of Judge Redfield 11 Am. Law Reg. n. E. page 259, as follows: 'The learned judge shows very conclusively, both upon authority and reason, that the opinion of the unprofessional witnesses, in such a case, is commonly far more reliable as a basis of ultimate decision, in questions of sanity and mental capacity, than any specific facts which could possibly be gathered from the witnesses. We have said in our book on wills, and in other places, all that we could desire to say, both as to the rationale of the rule, and the support which it receives from authority. The tendency of the American courts in the last few years has been largely in the direction contended for by the learned judge; and there seems to be little question that it must ultimately prevail all but universally. We should rejoice at such a result, as greatly tending towards the establishment of truth with greater facility and certainly in a very important class of cases.' See 1 Redf. on Wills 4th ed. A. D. 1876 138, 145, where many other cases than those hereinbefore alluded to are cited and commented upon. Thus supported upon principle and authority, I am satisfied that the time has arrived when this court is called upon to declare the law to be in conformity with the views I have expressed."

Right of Trial by Jury—Due Process of Law.

WALKER v. SAUVINET.

Supreme Court of the United States, October Term, 1875.

1. **Right of Trial by Jury.**—Article VII. of the amendments to the United States constitution, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," relates only to trials in the federal courts. The states, so far as this amendment is concerned, are left to regulate trials in their own courts, in their own way.

2. **Due Process of Law.**—Though a state can not deprive a person of his property without due process of law, this does not necessarily mean trial by jury. Due process of law is process due according to the law of the land, and is regulated by the law of the state. Clifford and Field, J.J., dissenting.

In error to the Supreme Court of the state of Louisiana.

Chief Justice WAITE delivered the opinion of the court.

This is an action brought by Sauvinet against Walker, a licensed

keeper of a coffee-house in New Orleans, for refusing him refreshments when called for, on the ground that he was a man of color.

Art. 13, of the constitution of Louisiana, provides that "All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or of public resort, or for which a license is required by either state, parish or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color." On the 23rd February, 1869, an act was passed by the general assembly of the state, entitled "An act to enforce the thirteenth article of the constitution of this state, and to regulate the licenses mentioned in said thirteenth article." Sec. 3 of this act is as follows:

"SEC. 3. That all licenses hereafter granted by this state, and by all parishes and municipalities therein, to persons engaged in business, or keeping places of public resort, shall contain the express condition that the place of business or public resort shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color, and any person who shall violate the condition of such license shall, on conviction thereof, be punished by forfeiture of his license, and his place of business or public resort shall be closed, and, moreover, shall be liable at the suit of the person aggrieved to such damages as he shall sustain thereby, before any court of competent jurisdiction."

On the 27th February, 1871, another act was passed entitled "An act to regulate the mode of trying cases arising under the provisions of article thirteen (13) of the constitution of Louisiana, or under any acts of the legislature to enforce the said article thirteen of the said constitution, and to regulate the licenses therein mentioned."

Secs. 1 and 2 of this act are as follows:

"SECTION I. *Be it enacted by the senate and house of representatives of the state of Louisiana in general assembly convened,* That all cases brought for the purpose of vindicating asserting, or maintaining the rights, privileges, and immunities guaranteed to all persons under the provisions of the article thirteen of the constitution of Louisiana, or under the provisions of any acts of the legislature to enforce the said article thirteen, and to regulate the licenses therein mentioned, or for the purpose of recovering damages for the violation of said rights, privileges, and immunities, shall be tried by the court, or by a jury, if any party to the suit prays for a trial by a jury.

"SECTION II. *Be it further enacted, etc.,* That if the jury do not agree or fail to render a verdict, either for the plaintiff or defendant, the jury shall be discharged, and the case shall be immediately submitted to the judge upon the pleadings and evidence already on file, as if the case had been originally tried without the intervention of a jury; and it shall be the duty of the judge to decide the case at once, without any further proceedings, arguments, continuance, or delay; each party having the right to appeal to the supreme court in all cases where an appeal is allowed by law."

Walker in his answer denied all the allegations in the petition and prayed for a trial by jury. The cause was thereupon tried to a jury who failed to agree. This having been entered upon the minutes, Sauvnet, by his counsel, moved that the court proceed to decide the case under the provisions of sec. 2 of the act of 1871. To this Walker objected, alleging for cause that the act was unconstitutional, but without specifying in what particular. Time was given counsel to file briefs upon the constitutional question, and, at a later day, after consideration, a judgment was rendered against Walker for one thousand dollars. That judgment was affirmed upon appeal to the supreme court of the state, and this court is now called upon to re-examine the judgment of affirmance.

So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

All questions arising under the constitution of the state alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By article VII. of the amendments, it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliot*, 21 Wall. 557. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art. VI. Const. Here the state courts has decided that the proceedings below was in accordance with the law of the state, and we do not find that to be contrary to the constitution, or any law or treaty of the United States.

The other questions presented by the assignment of errors and argued

here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below.

The judgment is affirmed.

Mr. Justice CLIFFORD dissenting. I dissent from the opinion and judgment of the court in this case, and I am requested to say that Mr. Justice Field also dissents both from the opinion and judgment.

Foreclosure of Deed of Trust—Lien of Judgment.

WARNER v. VEITCH.

St. Louis Court of Appeals, June Term, 1876.

Hon. THOMAS T. GANTT,	} Judges.
" EDWARD A. LEWIS,	
" ROBERT A. BAKEWELL,	

1. **Case in Judgment.**—On 23d January one E. conveyed to defendant in trust, to secure his certain note of hand, a lot of land on which he resided. On 31st May, one B. obtained judgment against him, which judgment was assigned to plaintiff. On June 1st, E. executed a mortgage on the same land. Default having been made in the payment of the note, the deed of trust was foreclosed, and after paying the debt described in the deed, there remained a balance in the hands of the defendant, which on demand he paid over to the holder of the mortgage. On a suit brought against the trustee by the holder of the judgment, *Held*, that the plaintiff not having enforced her lien by a levy and sale of the equity of redemption, but having suffered the land to be sold to satisfy a prior encumbrance, the sale converted the land into money, on which her lien did not attach.

2. — The statutory lien of a judgment does not follow the surplus produced by a sale of land under a pre-existing deed of trust.

Appeal from Circuit Court of St. Louis County.

The opinion of the court was delivered by BAKEWELL, J.

This is a proceeding in equity to recover from defendant certain moneys, surplus remaining in his hands after foreclosure of a deed of trust, of which he was trustee.

It appears from the pleadings and evidence that, on the 23d of January, 1871, one Everett conveyed to Veitch a certain lot in St. Joseph, Mo., on which Everett was then residing with his family. This conveyance was in trust to secure to the Covenant Life Insurance Company the payment of a note of \$3,000, therein described, and contained the usual provisions for sale on default of payment. The deed contains the customary clause that the surplus, in case of sale, should be paid to the grantor, or his legal representatives. On the 31st of May, 1871, Philoman Bliss recovered judgment in the Circuit Court of Buchanan County against Everett for \$899 and costs. This judgment was a lien upon the real estate mentioned in the deed of trust, and next in priority. This judgment was duly assigned to plaintiff. On June 1, 1872, Everett executed to one Saxton a mortgage upon the same lot of ground, to secure to him an indebtedness of \$1,711. Both of these instruments were duly recorded as soon as delivered. On September 10, 1873, whilst the judgment and mortgage were unpaid, default having been made in the payment of the note secured by deed of trust, the same was foreclosed according to its terms, and after paying the debt described in the deed, there remained in the hands of the trustee \$1,710.52. At the time of the sale the defendant, the trustee, had notice of the judgment owned by Mrs. Warner; and after the sale, and whilst the surplus was still in defendant's hands, the owner of the judgment demanded of defendant to apply so much of said surplus as was necessary to the payment of her judgment. This defendant refused to do, and, upon the order, in writing, of Everett, the grantor, paid said surplus to Saxton on account of his mortgage. An execution was issued on the judgment, just prior to the trust sale, and was, at the date of the sale, in the hands of the Sheriff of Buchanan county. Soon after the sale Everett surrendered possession to the purchaser. Everett was then, and is now, insolvent. Defendant avers that Everett had a valid homestead in the property conveyed by deed of trust, subject to the lien of that deed, at the time of the sale. This is denied by plaintiff.

Plaintiff prays for a decree that defendant pay her, out of the said proceeds of sale and surplus, the amount of her judgment and interest.

The court, at the conclusion of plaintiff's case, refused an instruction that she was not entitled to recover, made a special finding of facts, and gave judgment for plaintiff. Motions for a rehearing and a new trial filed by defendant having been overruled, the cause is brought here by appeal.

Judgments in this state are made by statute liens upon the real estate of the defendant. The lien of the judgment does not extend to personality. A person to whom land has been conveyed subject to a deed of trust, or the *cestui que trust*, where the conveyance is a second deed of trust, becomes thereby the legal representative of the grantor, and as such is entitled to receive the surplus funds remaining after the foreclosure. *Reid v. Mullins*, 43 Mo. We are, therefore, of opinion that the money in this case was rightly paid to Saxton, and the plaintiff is not entitled to recover.

We are told by counsel for plaintiff that where there are several liens upon a tract of land, and it is sold under one of them, the property, after paying the lien under which it was sold, belongs in equity to the next subsequent liens in the order of their priority. *Strawbridge v. Clark*, 52 Mo. And we are referred to Missouri cases in support of this view; but an examination of these cases does not establish this doctrine. The lien to which this rule is applied will be found, on examina-

tion, to be a lien created by deed giving an interest in the land. Neither in law nor equity does the statutory lien of a judgment follow the surplus produced by a sale of land under a pre-existing deed of trust. "A general lien by judgment on land," says Judge Story, in *Conard v. Atlantic Insurance Company*, 7 Peters, 443, "does not constitute *per se* a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment-creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person, except such judgment-creditor, and even against him, unless he consummate his title by a levy on the land under his judgment. In that event, the prior levy is, as to him, void, and the creditor loses all right under it. The case stands in this respect precisely on the same ground as any other defective levy or sale. The title of the land does not pass under it. In short, a judgment creditor has no *ius in re*, but a mere power to make his lien effectual by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of the vendor or vendee; or to claim the purchase-money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can take the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment-creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds at the sale of the land when it has been sold on his own execution and ought to be applied to its satisfaction. Or, we may add, if sold under another execution, follow the proceeds by the process of garnishment.

The same rule is laid down in well considered cases in Ohio, Illinois, and other states. Equity will not aid the lien where it fails at law. The existence of the lien and the method of enforcing are matters purely legal.

To make her lien available, Mrs. Warner should have enforced by a levy and sale of the equity of redemption. But she suffered it to be sold to satisfy a prior incumbrance; the sale converted the land into money. Had she garnished the trustee, she might have had the benefit of her lien and have held the fund; but not having done so, he acted in accordance with law in obeying the written instructions of Everett and paying over the money to the holder of the second mortgage.

The judgment of the circuit court is reversed, with the concurrence of all the judges; and, as all the facts are before us, it is our duty to give final judgment here for the defendant, which is accordingly done.

Negligence—Master and Servant—Fellow Servants.

HAUGH ET AL. v. THE TEXAS & PACIFIC RAILWAY COMPANY.

United States Circuit Court, Western District of Texas, April Term, 1876.

Before Hon. THOS. H. DUVAL, District Judge.

1. Construction of Road.—It is the duty of a railroad company to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipments, including properly constructed engines and their several parts, and in the selection of competent and skillful agents and subordinates to supervise, inspect, repair and regulate its machinery.

2. Fellow Servants.—The corporation or master is not liable for injuries suffered by one employee solely through the carelessness or negligence of another employee of the same master, engaged in the same general service or business, and under the same general control.

3. —. Each employee engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his co-employees.

4. Scientist of Master.—Before a master can be made liable to a servant, for an injury resulting from the incompetency or unskillfulness of another servant of the same master, it must be affirmatively shown, not only that the latter servant was unskillful or incompetent, but that the master knew it and did not exercise proper care in his selection. And if the injury arise from a defect or insufficiency of machinery, it must be shown that the master had positive knowledge of such defect or insufficiency and failed to exercise proper care in providing a remedy.

5. Who are Fellow Servants.—All agents and employees on a railroad who are engaged in the same general employment and business of keeping up, running and operating the road are fellow servants. Master-mechanics, foreman of round houses, and other persons engaged in the repair of machinery and rolling-stock are fellow servants with engineers, conductors and other persons engaged in running trains.

Robertson & Herndon of Tyler, and *Turner & Lipscomb* and *Geo. L. Hill* of Marshall, for the plaintiff; *F. B. Sexton* and *William Stedman* of Marshall, for the defendant.

The nature of the suit is sufficiently explained in the charge of the judge to the jury, which was as follows:

DUVAL, J.—This is a suit brought on the 9th, June, 1875, both for compensatory and exemplary damages, by Annie Haugh of the state of Iowa, in her own right, and as the surviving wife of Wentworth C. Haugh, and as the natural guardian of her infant son, James A. Haugh,

for the death of her husband, the said Wentworth C. Haugh. She alleges that her said husband being in the employment of the defendant, and in charge of engine No. 4, running between Shreveport and Marshall, was killed by said engine being thrown from the track on or about the 8th day of March, 1874, and that such death was the result of wilful and gross negligence of defendant in not furnishing a safe and reliable engine; that the engine in question was thrown from the track by a steer attempting to cross in front of it, and in consequence of the defective construction and arrangement of the pilot or cow-catcher, which failed to throw said animal from the track. She further alleges that the steam whistle attached to said engine was not properly and securely fastened to the boiler, so that when the engine fell over, the fastening of the whistle blew out, and a jet of scalding steam and hot water was thrown upon her husband, thereby causing his death, etc.

The defendant denies all these allegations, and avers that engine No. 4 was entirely safe and reliable; that the pilot or cow-catcher was properly constructed and attached to the same; that the engine was thrown from the track in consequence of a bull or steer running between the driving wheels and forward trucks, under such circumstances as rendered it impossible for human sagacity or exertion to prevent the accident. Defendant further avers that the whistle of said engine was securely fastened to the boiler, in accordance with the usual approved mode, and that if it came out of said engine at all, it did not blow out, but was knocked or torn out when the engine was thrown off the track; that if there was any defect about the engine, the same was well known to the deceased, and not known to the defendant, and that said deceased, who had run other engines belonging to defendant, was at his own request assigned to the run between Marshall and Shreveport, well knowing that said engine No. 4 belonged to, and was used upon, said run, etc.

These are the material issues made by the pleadings, and upon them, and the facts in evidence, I have to instruct the jury.

1. That it is the duty of a railroad company or corporation to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipments, including properly constructed engines and their several parts, and the necessary and proper material for their repair; also, to select competent and skillful agents and subordinates to supervise, inspect, repair and regulate the machinery, and to regulate and control the operations of the road. The corporation or master, however, is not liable for injuries suffered by one employee, solely through the carelessness or negligence of another employee of the same master, engaged in the same general service or business, and under the same general control.

Each employee engaged with others, in the service of a common master, takes upon himself the liability to injury resulting from the negligence of his co-employees. The hazard is incident to the nature of the employment in which he enters. There is no implied warranty of life or guaranty against injury. The employee takes his place subject to all the dangers incident to the position. The master is only bound to provide competent and proper machinery and materials, and to furnish skillful and careful employees to keep the same in repair and safe condition. If this be done, and one of the workmen or employees thus provided is simply guilty of negligence resulting in an injury to another employee, it is not the negligence of the master, and the corporation is not responsible. In such case, to render the master or corporation liable, the injury must have resulted to one servant, not from the mere negligence of another, but from his incompetency or unskillfulness, and this must be shown satisfactorily, and if the injury arises from a defect or insufficiency in the machinery or any of its necessary parts, which have been furnished by the master to the servant, a knowledge of this defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence and want of proper care. In other words, it must be shown that he either knew, or ought to have known the defects which caused the injury, in order to render him liable. A different rule, however, would apply as respects the liability of the master to a passenger over the road.

All agents and employees on a railroad, who are engaged in the same general employment and business of keeping up, running and operating the road, are fellow servants. Master-mechanics, foreman of round houses, and other persons engaged in the repair of machinery and rolling-stock for a railroad, are fellow servants with the engineers, conductors and other persons engaged in running trains.

Under the general principles of law as thus announced, I charge the jury:

2. That if they believe from the testimony that the accident which resulted in the death of W. C. Haugh, was produced by a bull running at, or under the locomotive or tender, of which said Haugh was the engineer, and throwing the same of the track, and that such accident occurred under such circumstances as that human skill and foresight could not prevent or reasonably provide against it, then the defendant was not guilty of negligence, and you will find for the defendant.

3. If you believe from the evidence that engine No. 4 was, when purchased and set up by the defendant, a standard and safe engine, and that the defendant exercised due and proper care in the employment of competent, prudent and skillful agents to keep it in the same condition, and that the accident in question was not one resulting from the want of such competency, prudence and skillfulness, then you will find for the defendant.

4. If there was a defect in engine No. 4, or in the pilot thereto attached, and you believe from the evidence that the same was known to the deceased while he was running said engine, and before the happening of the accident described in plaintiff's petition, or if you believe from the evidence that some days before the accident, the pilot attached to said engine was slightly damaged, or knocked out of square, but that

the same was repaired by the agents or servants of the defendant who were skilful and competent to make such repairs, and that after such repairs were made, said pilot was considered safe by those whose duty it was to make them and determine on their safety, and that the deceased afterwards received and ran said engine and pilot, then, in either event, you are instructed that the plaintiff can not recover, and you will find for the defendant. But,

5. If the jury are satisfied from the evidence before them, that the death of the deceased was owing, not to the negligence simply, but to the incompetency or want of skill on the part of any servant or agent of the defendant, who was working in the defendant's machine shops, then the defendant would be liable, and the plaintiff would be entitled to recover such actual pecuniary damage only, as the evidence may satisfy you the plaintiffs have sustained, and as you may think proportioned to the injury resulting from such death.

The testimony in this case is in some respects quite conflicting. It is the duty of the jury to reconcile all discrepancies, if they can, but whether they can or not, it is their right to weigh the whole of the evidence, and give to each and every part of it such weight and credence as they may think proper.

And in weighing the testimony and determining its credibility, the jury can consider the manner and mode of testifying by the witnesses, their acquaintance with the subject about which they testify, their interest in the result of the suit, if any, and any other circumstances they may think proper to take into account. Verdict for defendant.

Principal and Agent—Life Insurance—"Ultra Vires."

HOFFMAN v. JOHN HANCOCK MUT. LIFE INS. CO.

Supreme Court of the United States, October Term, 1875.

1. **Authority of Agent.**—An agent can only bind his principal by acts done in the manner usual in the line of the business in which he is acting.

2. **"Ultra Vires."**—The acceptance of a horse in part payment of a life premium by the agent of an insurance company was *ultra vires*, and did not constitute a valid contract, binding the company.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Mr. Justice SWAYNE delivered the opinion of the court.

There is a direct conflict in the testimony of the two principal witnesses in this case, and the discrepancies are irreconcilable. According to our view, the case must turn upon the application of legal principles to facts about which there is no controversy. An elaborate examination of the testimony is, therefore, unnecessary. A brief statement will be sufficient for the purposes of this opinion.

Justin E. Thayer was the general agent of the appellee at Cleveland, Ohio. He was authorized to appoint sub-agents, and on the 7th of April, 1869, appointed A. C. Goodwin such agent. This arrangement continued until the 7th of June, 1869. It was then put an end to by the parties, and they agreed that thereafter Goodwin should act as an insurance broker, and that he should receive for such applications as he might bring to Thayer, thirty per cent. of the first premium paid for the insurance. On the 7th of August, 1869, Goodwin gave to Frederick Hoffman a receipt, signed by Goodwin as agent, setting forth that he had received from Hoffman \$922.57, "being the first annual premium on an insurance of eight thousand dollars on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company of Boston. The said insurance to date from August 7th, 1869, subject to the conditions and agreements of the policies of said company and a policy by them granted thereon. The said policy, if issued, to be delivered by me, when received, to the holder of this receipt, which shall then be given up. It is expressly agreed and understood that if the above-mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt, but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up."

The amount of the premium specified was paid by Hoffman to Goodwin, as follows:

A horse valued at	\$400.00
A sixty-day note to Goodwin	100.00
A cancelled debt owing by Goodwin to Hoffman	58.57
A premium note of	369.00
	\$922.57

Goodwin reported the application to Thayer, but said nothing of the receipt. Thayer forwarded the application, and in due time received the policy. Sometimes afterwards Hoffman called for the policy. Thayer demanded the premium. Hoffman refused to pay it, and produced Goodwin's receipt. Thayer then, for the first time, learned the existence of the receipt and the particulars of the alleged payment of the premium. He refused to ratify the transaction.

Ineffectual attempts were made to sell the horse. Finally Thayer, to save trouble to his company, offered, if Hoffman would take back the horse, and pay in his stead \$250 to the company, the transaction should be closed and the policy delivered. This Hoffman refused to do, and sued the company in the Court of Common Pleas of Cuyahoga county for what he had delivered to Goodwin. A verdict was found for the defendant. He took a new trial under the statute of Ohio. Upon the re-trial a verdict was rendered in his favor. The defendant moved for a new trial, which was granted. In this condition of things Hoffman died.

The suit abated by his death and was not revived. Thereupon his widow, Henrietta Hoffman, filed this bill. It prayed that the company should be compelled to deliver the policy to her, and to pay the amount of the insurance money specified. The policy was upon what is known as the "endowment plan." It provided that the amount insured should be paid to Hoffman at the end of ten years, or to his wife in the event of his death in the meantime. No part of what was paid by Hoffman to Goodwin ever came into the hands of Thayer or the company, or endured in anywise to the benefit of either.

Goodwin testified that his share of the premium was "two hundred and seventy-six dollars and some cents," and further, that Thayer assented to the transaction in advance, and, with full knowledge of the facts, ratified it subsequently. If it be admitted that the facts as to assent and ratification by Thayer are as stated by Goodwin—a concession by no means warranted, in our judgment, by the state of the evidence—the question arises, what is the legal result?

Agencies are special, general and universal. Story's Agency, sec. 21. Within the sphere of the authority conferred the act of the agent is as binding upon the principal as if it were done by the principal himself. But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise. Upton v. Suffolk Co. Mills, 11 Cush. 586; Jones v. Warner, 11 Conn. 48; Story's Agency, sec. 60, and note; 3 Chitt. Law of Com. & Manuf., 199; U. S. v. Babbitt, 1 Black, 61; 1 Parsons on Contracts, 4th ed. pp. 41, 42.

Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies.

Goodwin had settled his own debt to Hoffman of \$53.67, and had appropriated to himself Hoffman's note of \$100. If he had the right to take his percentage in such a way as he might think proper, this did not justify his taking the horse at \$400. Nor, if Thayer had expressly agreed to take the horse in payment of the premiums *pro tanto*, could that have given validity to the transaction. If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands and do anything else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking.

The exercise of such a power by the agent was liable to two objections: It was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction. This objection is fatal to the appellant's case.

It is insisted by the counsel for the appellee that Hoffman, by bringing his action at law, repudiated and rescinded the contract, if there was one, and that the appellant is thereby estopped from maintaining this bill. Authorities are cited in support of this proposition. Herrington v. Hubbard, 2 Illinois, 569; Dalton v. Bentley, 15 Id. 420; Smith v. Smith, 19 Id. 349; Cooper v. Brown, 2 McLenn, 495; Williams v. Washington Life Ins. Co., 4 Big. Life & Acc. Ins. Rep., 56.

As the point already determined is conclusive of the case, it is unnecessary to consider this subject. The decree of the circuit court is affirmed.

Bankruptcy—False Statement in Petition—Final Judgment.

IN RE FUNKENSTEIN.

United States District Court, District of California.

Before Hon. OGDEN HOFFMAN, District Judge.

1. **False Statement in Petition.**—A petition in involuntary bankruptcy, alleged, among other things, that it was filed by one-fourth of the creditors representing one-third of the provable debts, as required by the act. The bankrupt made default, and the court entered an order that the facts set forth were true, and adjudicated him bankrupt. On a motion to set aside the adjudication, on the ground that the requisite number of creditors had not joined in the petition, *Held*, that it was not within the power of the court to do so.

2. **Final Judgment.**—That "the judgment shall be final," does not mean merely that no appeal shall lie from it, but that the matter so adjudged shall not thereafter be examined.

3. **Fraud.**—If the ground on which the motion was made were fraud, bad faith or collusion, the rule would be different.

Joseph Naphthely, for petitioners; David Freidenrich, for opposing creditors.

HOFFMAN, J.—The petition against the bankrupt in this case was filed on the 9th of April, 1875. It contained the usual averment that the petitioners constituted one-fourth in number of the creditors of the bankrupt, and that the aggregate of their debts, provable under the act, amounted to at least one-third of the debts so provable. On the return day of the order to show cause, the bankrupt made default and he was adjudged bankrupt. The order was in the form prescribed by the su-

preme court under the original act. It was not modified to accommodate it to the provisions of the amended act of June 22, 1874.

With respect to the allegations of the petition, the court adjudged "that the facts set forth in the petition were true."

On the 29th April, the bankrupt filed his duly verified schedules, setting forth his debts and liabilities. On the 21st day of May, 1875, the bankrupt filed his petition for discharge. This was opposed by several of his creditors, who also moved that the adjudication be set aside, and the proceedings vacated and dismissed, on the ground that the requisite number of creditors had not joined in the petition, and the debts due them were not of the amount required by the act. The matter was referred to the register, whose report is admitted to be true.

It appears that the petition was signed by seven creditors, representing in the aggregate \$4,292 of indebtedness. By the bankrupt's own schedules it appeared that the number of his creditors whose claims are undisputed are thirty-eight, and the aggregate of his indebtedness due them is \$115,062.76. These schedules were offered in evidence before the register, and their accuracy admitted. It thus appears that the petitioning creditors constitute less than a fifth in number of all the creditors, and the debts due them amount to less than a twentieth of the total indebtedness of the bankrupt.

Had these facts appeared on the return day of the rule to show cause the petition would have been dismissed as of course.

The question presented is, can the court now take notice of them, and if so, what action should be taken? The statute provides that if on the return day the debtor "shall admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject." And if it shall appear that such number and amount have not so petitioned, the court shall grant a reasonable time not exceeding ten days within which other creditors may join in such "petition." If, at the expiration of that time, the requirements of the statute are complied with, the matter may proceed. If not, it is to be dismissed.

It will be observed that these provisions contemplate two cases. The first, where the debtor admits in writing the allegations of the petition with regard to the number and amount of creditors, and the second, where those allegations are denied. No provision is made for cases where the debtor neither admits nor denies, but merely makes default. In the first case, the court is required, if satisfied that the admission was made in good faith, to so adjudge, which judgment is final.

In the succeeding section, the provisions seem to embrace cases of default as well as those where the bankrupt admits the facts. It enacts in substance, that if on the return day of the order to show cause the court shall be satisfied that the requirement of the act as to the number and amount of creditors has been complied with, or if within the prescribed time creditors sufficient to make up the required number and amount shall sign the petition, the court shall so adjudge, "which judgment shall be final."

It will be noticed that the form of the adjudication in the case at bar very imperfectly complies with these requirements. The act seems to contemplate a distinct and explicit judicial finding of the fact that the requisite number and amount of creditors have petitioned. And the judgment of the court on that point is made final. The form used merely finds that the allegations of the petition are true. This form, as before stated, is prescribed by the supreme court. It has not been modified since the passage of the amended act. The propriety of inserting the more explicit judgment which the act seems to contemplate has been overlooked.

But I do not consider that this irregularity is fatal to the proceeding. The judgment of the court that the allegations of the petition are true embraces all the allegations of the petitioner, as well those relating to the number and amount of the petitioning creditors as the other necessary averments. The court has in fact passed upon the truth of those allegations, as much as on that of the allegation of the residence of the plaintiff, and the date and existence of the act of bankruptcy, which are also facts necessary either to give the court jurisdiction, or to authorize the proceeding. The mere circumstance that its judgment has not been so explicit on one point as the act would seem to contemplate ought not to defeat the proceeding. The inconvenience and hardship of so holding would be very great, for the same form has been followed in all cases of involuntary bankruptcy in this district, and it is presumed in many others. The clerks have no doubt very generally contented themselves with following the forms prescribed by the supreme court.

The briefs of counsel in the case at bar discuss the question whether the averment with regard to the number and amount of creditors is a jurisdictional averment. On this point the opinions of the district judges are conflicting. The learned judge of the District Court for the Eastern District of Michigan holds that to give the court jurisdiction the petition must contain a clear, consistent and explicit allegation as to the proportionate number of creditors petitioning, and the amount of debts represented by them. For the want of such an allegation he vacated the order to show cause, and refused to allow an amendment. *In re Rosenfelds*, 11 B. R. 86. *In Ex parte Jewett*, 11 B. R. 443, the learned judge for the district of Massachusetts held that the insertion of the name of one of the creditors instead of that of the debtor, by a clerical mistake, did not vitiate a proceeding under the act to effect a composition, and that notwithstanding the error there was "a case in bankruptcy pending against the debtor." In this case there had been no adjudication. The views of Lowell, J., were adopted by the learned judge of the southern district of New York in the recent case of *In re Duncan, Sherman & Co.*, where the point raised in the case at bar was distinctly adjudged. In the two previous cases the point upon which the judges

differed was, whether it was necessary, in order to give jurisdiction, that the petition should contain a clear, consistent allegation that the requisite number and amount of creditors had joined in the petition. In the case at bar, as in that of *Duncan, Sherman & Co.*, the petition contains the requisite allegation, and the question really is, can the enquiry as to whether that allegation be true be reopened after the court has, on the return day of the rule to show cause, adjudged that it is. *Blatchford, J.*, held that the provision of the statute which declares the judgment of the court on the point shall be final, forbids the reopening of the question at any subsequent stage of the proceedings, unless fraud be alleged and proved. His language is: "Unless this be so, there is no necessary limit to the number of times the court may be required to re-examine the question thus declared to be finally adjudged. I speak now of an allegation merely that the court has erred, and not of an allegation of fraud or bad faith."

In these views I concur. I think the finality, attributed by the act to the judgment of the court, does not mean merely that no appeal shall lie from its judgment, but that the matters so adjudged shall not be thereafter re-examinable, even by itself. But I do not consider that Congress meant to deprive the court of its inherent right, where fraud and imposition have been practiced upon it, to apply the remedy. The ground upon which the present motion is based is merely the insufficiency in number and amount of the petitioning creditors. In the brief of counsel, fraud and bad faith are charged. There is certainly much color for this accusation. The gross disparity between the aggregate of provable debts due the petitioning creditors, and the total amount of the bankrupt's indebtedness, vehemently suggests the suspicion that both parties must have known that the allegation that they represented one-third of his entire indebtedness was untrue. The creditors could have been at little pains to ascertain the facts if they supposed \$4,292 to be one-third of an indebtedness which twenty days subsequently to the filing of the petition the bankrupt stated under oath to be \$115,062.76.

For some reason, the opposing creditors failed to prove their debts before the election of an assignee. The assignee was therefore chosen by the petitioning creditors. He reports that no assets whatever have come into his possession. The counsel for the petitioning creditors intimate in their brief that the object of the opposing creditors in procuring the adjudication to be set aside, is to obtain the benefit of certain judgment liens on the real estate of the bankrupt.

But if so, why has the assignee failed to find the real estate? And why have they failed to point out to the assignee of their own selection assets which it is his duty to collect and distribute amongst all the creditors? The bankrupt about two years ago was adjudged bankrupt, but denied his discharge. The debts set forth in his schedule seem to have been contracted since the former adjudication. He claims that the debts from which he then sought to be discharged are barred by the statute of limitations.

Under all the circumstances, I think it proper that the opposing creditors should have an opportunity to allege, and prove if they can, fraud, bad faith or collusion in obtaining the adjudication. I therefore deny the motion as it is now made, but leave is given to renew it on the ground of fraud, bad faith or collusion.

Railway Aid—Power to Donate Bonds in Lieu of Lands.

CONVERSE v. CITY OF FORT SCOTT.

Supreme Court of the United States, October Term, 1875.

Where the mayor and council of a municipality were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and to borrow money to an unlimited extent when instructed to do so by a popular vote, and likewise to issue bonds to fund any indebtedness of the city, existing or to be created, *Held*, that all conditions precedent being performed by the city, it had power to grant bonds to the amount voted in lieu of the ground and right of way.

In error to the Circuit Court of the United States for the District of Kansas.

Mr Justice STRONG delivered the opinion of the court.

The general legislation of Kansas confers unusual power upon municipal corporations in that state. Not only are they authorized to subscribe for and take stock in any railroad company duly organized under any law of the state or territory, and to loan their credit to such corporations, upon such conditions as they may prescribe, (Acts of 1869, ch. 29,) but the act of Feb. 28th, 1868, (Gen. Stats., ch. 19,) confers upon some of them much more extended powers. It enlarges the range of municipal authority and duty far beyond the limits within which such corporations are commonly understood to be confined. That was an act providing for the incorporation of cities of the second class, of which the city of Fort Scott is one. By the 29th section the mayor and council of each such city governed by the act are empowered to enact, ordain, alter, modify, or repeal such ordinances as it shall deem expedient "for the benefit of trade and commerce" among others. Section 30, subsec. 32, grants power "to take all needful steps to protect the interest of the city, present or prospective, in any railroad leading from or towards the same; but not to take stock in any railroad with out a vote of a majority of the legal voters." Sub-section 33, of sec. 30, authorizes all such ordinances as may be expedient, and not inconsistent with the laws of the state, maintaining, inter alia, "the trade, commerce, and

manufactories" of the city; and the 37th sub-sec. (which has a very direct bearing upon the case now before us) empowers the mayor and council "to take private property for public use, or for the purpose of giving the right of way or other privilege to any railroad company, or for the purpose of erecting, or establishing market-houses and market-places, or for any other necessary public purpose. Provided, however, that in all cases the city shall make the person or persons whose property shall be taken, or injured thereby, adequate compensation therefor, to be determined by the assessment of five disinterested householders of the city," etc. Sub-section 39 authorizes the mayor and council to borrow money on the credit of the city, with no other limitation than that no money shall be borrowed on any contract thereafter made exceeding two thousand dollars, without the instruction of a majority of all the votes cast at an election held in the city for that purpose. And sub-section 40 authorizes the issue of bonds to fund any and all indebtedness existing, or subsequently created, due, or to become due. By these sections the legislature manifestly contemplated a lawful acquisition by the city of interests in railroads leading from or towards it, and authorized municipal legislation in their favor, for the promotion of trade and commerce. The thirty-seventh section expressly conferred the power to give to a railroad company a right of way into or through the city, authorized the expenditure of money to enable the city thus to aid the company, and for the purpose of such aid empowered the city to make use of the state's right of eminent domain. Nothing can be clearer, it appears to us, than that the power to make a donation of a right of way, or of a site for station-houses, machine-shops, and other like conveniences, was thus vested in the mayor and city council. If we are correct, therefore, it remains only to enquire whether the issue of the bonds held by the plaintiff, was within the authority thus conferred on the city. On the 25th day of July, 1870, a city ordinance was passed by which it was ordained, among other things, that a special election should be held in the several wards of the city, on the 30th of August next following, for the purpose of submitting to the qualified electors the question of authorizing the mayor and city council to issue bonds in a sum not exceeding \$25,000.00, for the purpose of procuring the right of way for the road of The Missouri, Kansas, and Texas Railway Company, through the corporate limits of the city, and also procuring grounds for depots, engine-houses, machine-shops, and yard-room, and donating the same to the company. By the eighth section of the ordinance it was declared to be the duty of the mayor and council, in case the election should result in favor of the donation, to confer forthwith with the officers of the railroad company, and ascertain at the earliest possible moment the route selected by the company for the line of their road, through the corporate limits of the city, and also the ground chosen by them for depots and other purposes, and to proceed in such manner as might be deemed most conducive to the interests of the city, to purchase so much land as might be necessary for the right of way, and also twenty-five acres exclusive of the right of way, at such convenient point within the city as the officers of the railroad company might select, for depots, engine-houses, machine-shops, and yard-room, and to issue the bonds of the city to an amount not exceeding twenty-five thousand dollars to pay for the same. The tenth section ordained that as the mayor and city councils purchased or procured the right of way and grounds above specified, they should donate or convey the same for a nominal consideration, or cause the same to be donated or conveyed for a nominal consideration, by an indefeasible title in fee simple to said company; provided, however, that in their judgment the company had first given evidence of their determination to comply with certain conditions specified in the fourth section of the ordinance.

At the election thus ordered, the proposition submitted was approved by a large majority of the legal voters, and the case finds that the railroad company did comply with the conditions mentioned in the ordinance.

Why this action of the city councils and the donation proposed to be made under it were not authorized by the act of the state legislature of Feb. 28, 1868, we are unable to perceive, and the argument submitted to us on behalf of the defendant in error has made no serious attempt to show. Indeed it may be doubted whether the act of 1868 was called to the attention of the circuit court. It has been contended here that another act, passed in 1869, gave no such authority to the mayor and city council, but the argument quite overlooks the grant of powers expressly made by the act of 1868. The act of 1869 authorized the council of any city to subscribe for stock for the city in any railroad company organized under the laws of the state or territory of Kansas, or to loan the credit of the city to such company upon such conditions as might be prescribed by the city authorities, provided such subscription was previously assented to by a majority of the qualified electors voting at a general or special election, and in case such an assent was given, the act made it the duty of the city authorities to take the subscription. This act speaks only of subscriptions and loans of credit, but the act of 1868 contemplated donations. If, then, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and if they were authorized to borrow money to an unlimited extent when instructed so to do by a popular vote, and further, to issue bonds to fund any indebtedness of the city, existing or to be created, it is clear they had the power to agree to give up on conditions.

We have noticed that by the ordinance of July 25, 1868, conditions were attached to the proposed gift, conditions to be performed by the railroad company. It was after this, after the submission of the proposition to the people, and its approval, and after a compliance with its conditions by the company, that the ordinance of Dec. 22, 1870, was passed. Its preamble recites the submission of the proposition to issue the bonds,

for the purposes mentioned, to a popular vote, its approval by a large majority; that the railway company had so far complied with the conditions on their part to be done and performed, as to enable them to demand from the city the right of way and grounds; that in the exercise of this right they had made a proposition to the city to accept the \$25,000.00 of bonds so voted, in lieu of said grounds and right of way, and in full satisfaction and discharge of all the obligation resting on the city in relation thereto; and that after full and careful consideration, it was deemed advisable to accept the proposition, and issue to the company the bonds. With such a preamble, the ordinance directed the mayor and city clerk to execute and deliver to the railroad company bonds to the amount of \$25,000.00 for the avowed purpose of discharging the city's obligation.

The bonds were accordingly issued and registered in the office of the auditor of the state, who certified upon each that it had been regularly and legally issued, that the signature to it was genuine, and that it had been duly registered in accordance with a statute of the state. The plaintiff then purchased the bonds and coupons before their maturity, without any actual knowledge of the defenses set up against them. Indeed, no defense is set up except an alleged want of authority for their issue, a defense which, in view of the legislation of the state, and of the city ordinances, has, in our opinion, no foundation. Certainly it has none unless a power conferred upon a municipality is different from what the same power would be when possessed by another holder, a doctrine which no one will venture to assert. It follows that, on the facts found by the circuit court, the judgment should have been given for the plaintiff.

Judgment reversed, and the cause is remanded for a new trial.

Military Seizure of Abandoned Property—Statute of Limitations.

HARRISON v. EXECUTRIX OF MILLER.

Supreme Court of the United States, October Term, 1875.

1. Case in Judgment.—Real estate leased in 1859 for five years, rent payable monthly, was seized in 1862, as abandoned property, by United States military authorities, who forcibly evicted from the premises the lessee, who to that time had paid full rent to lessor, and afterward the lessee, under a new contract of lease with said authorities, was compelled to pay them rent for the time he thereafter occupied the premises. On a suit begun November, 1862, by the lessor, to recover of the lessee rent to August 8, 1865, when lessee surrendered the property, *Held*, that the effect of the seizure was to deprive the lessee of all rights of possession or occupancy under his former lessor, and having fulfilled all the requirements of the new contract of lease, he is exempt from any further demand.

2. Statute of Limitation.—The action was barred by the state statute of limitation of three years.

3. Construction of.—The construction and decision of the supreme court of a state, of and upon a statute of limitations, enacted by the state legislature, is not subject to re-examination by the Supreme Court of the United States under a writ of error to the state court, in cases where the controversy is between citizens of the same state, the defendant not being beyond the reach of process during the period of the statute, and there being, during that period, no interruption of judicial proceedings by cause of insurrection.

4. Suspension of.—where a prior suit was commenced, and afterwards discontinued, and the law of the state provides that "if the plaintiff, after making his demand, shall abandon or discontinue it, the interruption shall be considered as never having happened." *Held*, no suspension of the statute.

5. Not Suspended by the War.—In a controversy between citizens of the same state, there was no suspension of the statutes of limitation by reason of the war.

In error to the Supreme Court of the state of Louisiana.

Mr. Justice CLIFFORD delivered the opinion of the court.

Certain brick tenements, situated in New Orleans and more particularly described in the record, were, on the thirteenth of June, 1859, leased by the plaintiff to the testator of the defendant, for and during the full term of five years, to begin on the first of October in the same year, and to terminate at the end of five years from the commencement of the term, and in consideration thereof the lessee covenanted and agreed to pay to the lessor the annual rent of two thousand dollars, payable in monthly installments at the end of each and every month. Monthly payments were punctually made from the expiration of the first month until the first of May, 1862, when he ceased to make the required payments. Pursuant to the lease, the decedent, then in full life, entered into the immediate possession of the premises, and it appears that he continued in the possession of the same, until the eighth of August, 1865, as alleged by the plaintiff. Payments subsequent to May 1, 1862, were refused, because the premises were on that day seized by the military authorities of the United States, as abandoned property, and the lessee was compelled to pay rent to those military authorities. Notwithstanding that, rent was still claimed by the plaintiff, as the lessor of the premises, and payment having been refused, he instituted the present suit to recover the unpaid installments, amounting in the whole to eight thousand one hundred and three dollars and twenty-five cents, together with lawful interest.

Service was made and the defendant, as the widow and executrix of the testator, appeared and filed an answer, setting up three defenses: (1) That all and singular the allegations contained in the petition are untrue. (2) That the military authorities of the United States seized the premises as abandoned property, and that the lessee was compelled to pay rent to those authorities during the whole period for which the

rent was not paid to the plaintiff. (3) That the cause of action is barred by the prescription of three years. Proofs were introduced on both sides in the state district court, where the suit was commenced; and the court, having heard the parties, rendered judgment for the defendant. Three exceptions were filed by the plaintiff, and he appealed to the supreme court of the state, where the parties were again heard, and the supreme court overruled the exceptions filed by the plaintiff, and affirmed the judgment rendered by the district court. Immediate steps were taken by the plaintiff to remove the cause into this court, and the errors assigned in the argument here are substantially the same as those assigned in the supreme court of the state.

1. Much discussion of the first defence set up in the answer is unnecessary, as it is clear that the theory of fact which it assumes can not be sustained. Sufficient appears to show that the lease was duly executed, and that the lessee took possession of the premises, and that he continued to occupy the same during the whole period alleged in the petition. Suppose that is so, still it is insisted by the defendant that the second defence pleaded is fully sustained, and the court here concurs in that proposition.

2. Conclusive proof is exhibited in the record that the premises were seized by the orders of the military authorities of the United States, and that the lessee, during the absence of the lessor from the state, was compelled to pay rent to the military authorities commanding the district; that the lessee of the plaintiff, then in full life, was formally ejected from the premises by the military authorities, and that his agent then and there found it necessary, in order to preserve his effects and to enable him to retain possession of the tenements and to continue his business, to enter into a new contract of lease with the military authorities, by whom the premises had been seized as abandoned property, and who were in the supreme control of all such matters within the district where the premises were situated. Evidence was also introduced to show that the rent, as stipulated in the new contract of lease, was subsequently paid by the agent of the decedent to the military authorities of the United States throughout the whole residue of the period during which the premises were occupied by the testator of the defendant. Satisfactory proof was also introduced by the defendant, and is exhibited in the transcript, that the military commander of the district, prior to that time, published a military order commanding all tenants in possession of properties belonging to persons not known by them to be loyal citizens, not to pay over rents for the same, but to retain in their hands all moneys due to such persons, and warning such tenants, in case they paid such moneys to such persons without authority, that they would be held personally responsible for the amount so paid, and directing that all rents due or to become due, by tenants of property belonging to such persons, should be paid to the financial clerk of the district. All rent due to the military authorities of the United States has been paid, and it is admitted that all rent for the premises to the first of May, 1862, was duly paid to the plaintiff, his claim now being for the rent of the premises for the period subsequent to the time when the decedent was ejected from the premises, and for the period during which the decedent paid rent under the new contract of lease with the military authorities of the United States.

Enough appears to show, beyond all doubt, that the premises were seized as abandoned property, and that decedent was compelled to pay rent to the military authorities of the United States, under a new contract of lease. Collusion is not even suggested, and inasmuch as the decedent was obliged to render obedience to the paramount authority, it was entirely competent for him to enter into a new contract to protect his interest.

Grant that, and still it is insisted by the plaintiff that he is entitled to recover the rent under his lease, deducting the amount of the rent paid by the decedent to his new lessors, but the court here is entirely of a different opinion. His property was seized as abandoned property, he, the plaintiff, having left the jurisdiction, and the effect of the seizure was to deprive the decedent of all right of possession or occupancy, and of course he was obliged to leave the premises or make a new contract with those having the dominion over the same, and having such new contract with those having and exercising such dominion over the premises, all that can be required of him, or his legal representatives, is to fulfill that new contract. Such payments having been made, the legal representative of the decedent may well claim to be exempt from any further demand. La. Code, 1875, Article 2696. From the very nature of the contract, it is held by the law of that state that the lessor is required to maintain the thing in such a condition as to serve the use for which it is hired, and to cause the lessee to be in the peaceable possession of the thing, during the continuance of the lease; and the provision is that if the thing be totally destroyed during the lease, by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. Arts. 2692, 2697. Seizure and eviction from the premises, it is insisted by the defendant, are, under the circumstances, equivalent to sequestration to support the war, and that the decedent, inasmuch as he was compelled to give up the possession of the premises to the ruling military power, is thereby discharged from all obligation to pay the future rent to the plaintiff.

3. Suppose, however, that the second defence is insufficient; then it becomes necessary to examine the third, which is the defence sustained by the supreme court of the state. By the record it appears that rent is claimed to the eighth of August, 1865, and that the suit was not commenced until the sixteenth of November, 1868, more than three years subsequent to the time when, by the terms of the lease, the whole rent became due. Two objections are taken by the plaintiff to the sufficiency of that defence:

1. That he commenced a prior suit, which was discontinued, and he

suggests, rather than argues, that the statute ceased to run from the commencement of the first suit. Statutes exist in some of the states providing that where a first suit is abated and a second suit is brought within a prescribed time, that the statute of limitations shall cease to run from the date of the first suit, but the court is not referred to any such enactment, as applicable to this case, and it is believed that none such exists, as the code of the state provides that if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened. O. Code, Art. 3485. *Levy v. Stewart*, 11 Wall. 252. Grant that, still the defendant insists that the war of the rebellion did not close until the twentieth of August, 1866, and that the time from the date of the last charge in the claim, to the close of the war, should be deducted from the period which has elapsed since the cause of action accrued, in computing the time fixed by the statute of limitations, but the court here is of the opinion that the rule does not apply in the case before the court. Beyond doubt it does apply in a suit in the circuit court of the United States, where the suit is between a citizen of the state where the suit is brought and a citizen of another state. *Hanger v. Abbot*, 6 Wall. 532. *Levy v. Stewart*, 11 Id. 249. *Adger v. Aiston*, 15 Wall. 560. Repeated decisions of this court have established the rule as applied in the circuit courts of the United States, in controversies between citizens of different states, but the case under examination was brought here by a writ of error to the state court, and it appears that the suit and controversy were between citizens of the same state. *U. S. v. Willey*, 11 Id. 512. *The Protector*, 12 Id. 700.

Congress has provided to the effect, that where the defendant can not be served with process, by reason of resistance to the execution of the laws, or the interruption of the ordinary course of judicial proceedings, the time during which the defendant shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action. 13 Stat. at Large, 123. Cases falling within that provision, whether in the state or federal courts, are governed by it, but the difficulty which the plaintiff has to encounter is that the district where the cause of action, if any, arose, was within the control of the United State, throughout the whole period, nor does the record contain any evidence whatever to show either that the defendant was at any time, beyond the reach of process, or that the insurgents were in a condition to occasion any interruption of the ordinary course of judicial proceedings in that district. *Stewart v. Kahn*, 11 Wall. 506.

Viewed in the light of these suggestions, it is quite clear that it was competent for the supreme court of the state to construe and apply the statute of limitations, enacted by the state legislature, and that their decision in that regard is not subject to re-examination here, under a writ of error to a state court.

Judgment affirmed.

Common Carriers--When Liable as Warehousemen.

LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD
v. MARIS.

Supreme Court of Kansas,

Hon. S. A. KINGMAN, Chief Justice.

" D. M. VALENTINE, } Judges.

" D. J. BREWER, }

1. **Carrier--How Long Liability Continues.**—The extraordinary liability of a railroad company as carrier of goods extends not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods and remove them in the usual hours of business, and in the ordinary course of business.

2. **What is a Reasonable Time.**—This reasonable time is not a time varying with the distance, convenience or necessities of the consignees, but is such time as would enable a person living in the vicinity of the place of delivery, in the usual course of business and within the ordinary hours of business, to inspect the goods and take them away.

3. —. Where goods are permitted by the consignee to remain eight days in the depot of the company, at the place of delivery, that is, more than a reasonable time, and if the goods are then lost or destroyed without any negligence on the part of the carrier, it is not responsible.

4. **When Liability Expires.**—After the expiration of such reasonable time, the carrier is responsible not as carrier, but only as warehouseman and for ordinary negligence.

5. **Notice to Shipper.**—Where the carrier and shipper, by special contract, stipulated for notice without any limitations or conditions, the reasonable time for removal commences from the time of the notice, and not from the time of the arrival of the goods.

6. **Notice Contains Conditions.**—Where, after stipulation for notices without any agreement as to the form or conditions thereof, the carrier gives notice, with a condition written thereunder, that the liability of the carrier terminates upon the arrival of the goods, and the consignee receives such notice, without objection, and continues his shipments over the road, held, that this was equivalent to a construction by the parties, and binding upon both, that the agreement for notice was simply for the accommodation of the consignee, and without extending the extraordinary liability of the carrier.

BREWER, J., delivered the opinion of the court.

This was an action brought by defendant in error to recover for goods destroyed by fire in a depot belonging to the plaintiff in error, and the question is, whether the company, at the time of the fire, occupied towards the goods the position of carrier, or that of warehouseman.

The case was tried upon an agreed statement of facts. It is not contended that the fire was caused by the negligence of the company, or that, if its liability as carrier had terminated, it was responsible for the loss. The material facts are these: Maris was a merchant at Winfield, a place about 90 miles west of Independence, a point on the company's road. Goods were shipped to him over the company's road, to be delivered to him at Independence. The goods in question reached Independence on the 4th and 7th days of January, 1872, and were placed in the depot building, and there remained until consumed by fire on the 15th of January, 1872. Immediately after the arrival of such consignment of goods at Independence, notice thereof was forwarded by mail to Maris at Winfield, but did not reach him until the 20th of January, and after the fire. A tri-weekly mail ran between the two places. Ordinarily only two days were occupied in transmitting the mail. During that month the epizootic was prevailing among the horses in that section of the country, and owing to that, or some other cause over which neither party had any control, the notice did not reach Maris until the 20th. He called every day at the post office in Winfield for his mail. The only means of conveying goods from Independence to Winfield was by wagon, and under favorable circumstances the trip from Winfield to Independence took from three to five days, and the round trip from six to ten days.

By special agreement between the parties, notice was to be given Maris by mail of the arrival of the goods at Independence. The form of the notice given,—and Maris had, prior to the 1st of January, received similar notices of the arrival of other goods,—was as follows:

"Freight Office, L. L. & G. R. R. Line. There this day arrived at our depot, at ———, consigned to you, the following articles:

No.	Articles.	No.	Articles.
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Weight, ———.	"Exhibit A."	Charges, ———.
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Which are ready for delivery to you on payment of freight and charges. N. B.—No goods delivered until all the charges thereon are paid. Storage will be charged in all cases where goods are not removed within the prescribed time.

The contract of this company as common carriers ends upon the arrival of goods at our depots, and the company will not be responsible for damage from ordinary leakage, breakage, or insufficient coverage, and no claims for damages will be allowed after the goods leave the depot, unless by consent of the agent.

Goods will be delivered only to the owner or his written order. A receipt for the goods will, in all cases, be required, and no claim will be entertained for goods lost after such receipt has been taken. AGENT."

Upon these facts some questions of importance are presented.

It is insisted on behalf of the company, in the first place, "that a common carrier is relieved of its extraordinary liability as an insurer, whenever it has carried the goods entrusted to it safely and deposited them in a safe warehouse." This question of the period at which the carrier's extraordinary liability terminates comes to us borne upon two opposing lines of decisions. At the head of one line stands the case of the *Norway Plains Co. v. B. & M. R. R. Co.*, 1 Gray, 263, in which the great jurist of Massachusetts, C. J. Shaw, holds that this liability of the carrier terminates when the goods are unloaded at their place of destination and are ready for removal by the consignee; that if the latter be not present to receive them, and they are kept by the company in its depot or warehouse, its liability is that of a warehouseman. In other words, this liability continues only during the actual transit, and that when this is ended, if the consignee does not immediately receive them, the company as carriers deliver them to the company as warehousemen, and thereafter the company is liable only for loss resulting from actual negligence. At the head of the other line is the case of *Moses v. B. & M. R. W. Co.*, 32 New Hampshire, 623, in which the court decided that the carrier's liability continues after the termination of the actual transit and until the consignee has a reasonable time to remove the goods. That as the carrier's liability commences not with the actual transit of the goods, but from the time of receipt from the consignor, so it continues until actual delivery to the consignee, or what is equivalent to a delivery, until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business. The mere fact that either before or after the actual transit they are placed by the company in its depot or warehouse does not change the character of its liability. The following cases support the Massachusetts doctrine: *McCarty v. N. G. & Erie R. R. Co.*, 30 Penn. St. 253; *Francis v. Dubuque & S. C. R. R. Co.*, 25 Iowa, 60; *Bauserman v. T. W. & W. R. W. Co.*, 25 Ind. 434; *C. & C. Air Line R. R. Co. v. McCool*, 26 Ind. 140; *C. & A. R. R. Co. v. Scott*, 42 Ill. 133. The other doctrine is adopted in the following cases: *Fenner v. R. & St. L. R. R. Co.*, 44 N. Y. 505; *Zuin v. New Jersey St. Co.*, 49 N. Y. 442; *Wood v. Crocker*, 18 Wis. 345; *Dersoin v. St. P. & W. R. R. Co.*, 18 Minn. 133; *Morris & Essex R. R. Co. v. Ayres*, 5 Dutch. 393; *Blumenthal v. Brainerd*, 38 Vt. 413; *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79; *Jeffersonville R. R. Co. v. Cleveland*, 2 Bush. 468; *Hilliard v. Wilmington etc., R. R. Co.*, 6 Jones (Law) 343.

The question is a new one in this state, and one of no small importance both to carriers and shippers. Notwithstanding there is a technical precision in the Massachusetts doctrine which makes it both capable of exact statement and easy of application, we think the other doctrine more just and reasonable in its application to the ordinary transactions of business, protecting both the shipper and the carrier. It extends a little the duration of the carrier's obligation, but only so far as seems necessary to protect the shipper. The goods remain in the custody of the carrier and subject to his control. The exact moment of arrival can seldom be known to the consignee even if he have notice of the shipment.

It is unreasonable to compel him to remain at the depot of the carrier waiting the arrival of the goods, or assume all the risks of the uncertainties in the delay of transportation and time of arrival. We therefore hold that the carrier's liability continues until the consignee has had a reasonable time to call for, examine and remove the goods.

What is a reasonable time? This is not a time varying with the distance, convenience or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods. It is well said by the court in the case from 18 Minn. 133, "That what would be, under the circumstances of the case, such reasonable time for the removal of the goods is not to be measured by any peculiar circumstances in the condition or situation of the consignee or plaintiff which might render it necessary for his convenience or accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with means and facilities of removing them, but that what is meant by reasonable time is such that would give a person residing in the vicinity of the place of delivery, and informed of the usual course of business on the part of the company, a suitable opportunity, within the usual business hours after the goods are ready for delivery, to come to the place of delivery, inspect the goods, and take them away." Tried by this rule, it is plain that the goods had remained in the depot more than a reasonable time for their inspection and removal. They should have been removed on the day of their arrival, or, at the furthest, during the business hours of the succeeding day.

It is insisted, however, that notice was required of their arrival, and that no notice was received until after the destruction. Whether independent of the special contract any notice was requisite, may be doubted. The consignee did not live at or near the place of delivery, and the authorities are conflicting upon the question whether notice is requisite even when the consignee lives at the place of delivery. See upon the question of notice: *McDonald v. W. R. R. Co.*, 34 N. Y. 497; *Fenner v. Buffalo & St. L. R. R. Co.*, 44 N. Y. 505; *Price v. Powell*, 3 N. Y. 322; *C. & A. R. R. Co. v. Scott*, 42 Ill. 133; *Dersoin v. W. & St. P. R. R. Co.*, 18 Minn. 133; *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79; *Hilliard v. W. & C. R. R. Co.*, 6 Jones (Law) 343. But whether notice, independently of any special contract, would have been requisite, need not be determined, for here the parties had stipulated for notice. And the question is, what effect did this notice have upon the company's liability? On the other hand, it is claimed that the reasonable time in which to remove the goods dates from the receipt of the notice, instead of the arrival of the goods; on the other, that the notice was purely a favor to the consignee, and that, specifying the time at which the carrier's liability was to cease, it can not be construed as enlarging that time. The question is one of difficulty. In those states where notice of the arrival of the goods is required to terminate the carrier's liability, it is held that the reasonable time for removal dates from the giving of the notice. This seems necessary to make the notice of any value, for if the reasonable time commence with the arrival of the goods, it might often expire before the receipt of notice. It would almost invariably so expire if the consignee lives elsewhere than at the place of delivery. Hence the notice would be meaningless as affecting the rights and liabilities of either party. On the other hand, the form of notice used by the company, and of which Maris had information by the receipt of such notices, attempts to limit the effect thereof, and plainly states that the company's liability as carrier is to terminate upon the arrival of the goods. Hence Maris had knowledge that while the company had agreed to give and would give notice of the arrival, it did so only as a favor to him, and without extending the duration of its extraordinary liability. If Maris was unwilling to continue the shipment of goods under such conditions, he was at liberty to stop—continuing, he accepts the conditions. To this it is replied that contracting for notice, without any stipulations as to the form and conditions of notice, carries with it all the rights which flow from the mere fact of notice, and that the company can not thereafter limit those rights by attaching conditions to that notice. This would doubtless be a satisfactory reply, if this were the first consignment and the first notice. But having received notices with similar conditions, and making no objections thereto, or seeking a new arrangement, it seems to us that he can not insist upon rights other than those given by the form of notice actually used. It must be borne in mind that this is not an attempt by the company to restrict its liability, but an attempt by special contract to enlarge it, and before the company should be bound by such special contract, it should be made clear that it had assented to it in full, as claimed. It is not pretended that the company had ever given any notice otherwise than with the conditions attached to this, nor is it claimed that the company would not be liable for any injuries resulting from its own negligence, so that its interpretation of its contract for notice,—an interpretation accepted by Maris without objection,—was that of an agreement to give information of the arrival of the goods, without in the meantime assuming any additional liability. We are aware that the agreed statement shows that the first notice was only received December 23d, 1871, and that owing to the sickness of one party employed, as well as to the prevalence of the epizootic, Maris failed to get a team to Independence before the destruction of all the goods of the various consignments, by fire on January 15th, 1872, but we fail to see anything which shows that Maris was unable to communicate by mail with the company, or to go himself or send some one to Independence to make a new arrangement, or stop the shipment, or receive and store the goods. Under these facts, though with some doubts, we are constrained to hold that the company's liability as carrier had terminated before the fire, and that therefore it was not responsible for the destruction of the goods.

The case having been tried upon an agreed statement of facts, the judgment will be reversed and the case remanded with instructions to enter judgment in favor of the plaintiff in error (defendant below.)

License Tax--Tax on Civil Privileges and Income.

§ 1. *Nature of the License Tax.*—Customs are taxes laid upon the importation and exportation of merchandise; an excise tax is the opposite of this; it is an inland imposition on the consumption, generally placed upon it in the hands of the retail dealer. Blackstone, Sharswood's Ed. vol. I, p. 318. This tax is levied almost universally in this country in the form of a license tax. A license is required, not only under the taxing power of the state, but also under the police power of the state.

The latter is the sovereign power of the state to govern men and things within the limits of its territory for the good of the state. For this purpose it may make, ordain and establish all kinds of laws, rules and regulations as to the manner in which persons may conduct themselves or use their property, as to the manner in which various trades, pursuits and avocations may be conducted. Taney, J., License Cases, 5 How; Comth. v. Alger, 7 Cush. 85; Cooley Const. Lim. 59, 56. The object of these laws being to enforce in a specific mode, upon all residents in the state, in the exercise of their rights both of person and property, the observance of the maxim *Sic utere tuo ut non alienum ledas*. The laws of health and inspection, laws regulating the sale of intoxicating drinks, the exhibitions for amusements, markets, weights and measures, the occupations of auctioneers and commission merchants, public conveyances, hacks and drays are examples of the exercise of the police power.

The breach of these laws is punished by pecuniary penalties imposed, sometimes by forfeiture of the property used. As to occupations, a license or permit to engage in the specified calling is required, and a fee is required to be paid to the officers issuing the license as a condition precedent to the exercise of its privileges. When the amount of the fee is such as would probably cover the expense of enforcing the regulations of the state as to the particular calling, it is under the police power, but when the fee is larger than is necessary for such purpose, and is exacted with reference to revenue, the license is issued under the taxing power of the state.

This is a most convenient mode of taxation, and is recognized in the constitutions of most of the states, where it is contrasted with the property tax, in those provisions which limit the power of the state to tax property otherwise than by a uniform system and according to value. But whether mentioned in the constitution or not, the provisions as to equality and conformity do not apply to taxes on licenses; only one of the states holds a different doctrine. What occupations may be taxed by requiring a license has not been determined with any degree of certainty. Almost every occupation has been the subject of this tax, and in a recent case, where the constitution in express terms provided for a license tax on commission merchants, peddlers, etc., and all other business which can not be reached by the *ad valorem* system, it was held a tax might be imposed on all merchants. Commonwealth v. Moore & Goodson, 25 Grat. 951. It was claimed in Arkansas that every person had a right to pursue any occupation he thought proper, subject only to such regulations by the state as would protect the rights of others, and that the exercise of this right was not subject to taxation except by express provision of the constitution. The court held in that case that the privileges which were the subject of taxation were such as were not possessed by all the citizens of the state, but such as were created by the legislative will, such as banking, ferries, roads, etc.; § 55, ante, and authorities. A different view is taken in Tennessee of the word privileges used in their constitution; this was a license tax on the privilege of standing stallions and jacks, and it was claimed that such an avocation was not a privilege, but a matter of right to every one. The court held that as to such avocations when prohibited by law, the license or permission to pursue them became a privilege and the subject of the taxing power of the legislature. Mabry v. Farrer, 11 Humphreys (Tenn.) 94. A privilege is defined in this state to be the exercise of an occupation or business which requires a license from some proper authority designated by a general law and not open to all, or any one, without a license. State v. Schlier, 3 Heiskell (Tenn.) 278; 4 Sneed (Tenn.) 193; Do. 258.

In Massachusetts, under a provision of its constitution allowing "the imposition of reasonable duties and exactions upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured or being within the state," the word "commodities" has always been applied to the privilege of conducting particular branches of business or employment, as the business of auctioneer, tavern keeper, etc. Portland Bank v. Aptrop, 12 Mass.; City of Boston v. Schaffer, 9 Pick. 415. These cases apply to the license tax, as it refers to the privileges treated of in the constitution of the state; where the constitution is silent on the subject, the right of the state to exact from its citizens a tax regulated by the avocations they pursue can not be questioned; the mode of levying the tax and the subjects of the tax are particularly within the province of the legislature. Durach's Appeal, 62 Penn. 491; Soc. for Savings v. Coite, 6 Wall. 606-7; Clifford, J., 6 Wall. 626, 638.

§ 2. *License not a Contract.*—The question whether the amount required to be paid for the license is a tax, or is paid under the police power, generally arises under the charters of cities, where there is a doubt as to the grant of the power to tax under the charter, but the grant of the police power is undoubted, and it is sought to justify the

exaction under that power. Mayor v. Second Avenue R. R. 32 N. Y. 261; Ash v. People, 11 Mich. 347. This subject is treated of in ch. — § 2—Post. As to the state where there is no constitutional limitation on the subject, its power is the same in each; it is the exercise of the sovereign power of the state for the good of its people, and they are the exclusive judges as to whether the mode adopted is the proper one to attain that end. Always subject to the proviso that no private rights secured by express constitutional provisions, other than their relating to taxation, are violated. A license is a personal privilege. 1 Henning & Munford, 339. It is not a contract; it is what its name purports, the written evidence of the permission of the state granted to one of its citizens to engage in a particular calling or avocation. The tax paid is not regarded as the consideration which moves the granting of the privilege, but as one of the conditions attached to the exercise of the privilege, a condition which must be complied with to entitle the party to enjoy the privilege at all. This permission may be revoked, annulled or amended at the pleasure of the legislature. In the state of New York the defendants had license to sell liquors under the excise act of 1857, which continued in force until 50 days after the third Tuesday in May, 1866. The act of 1866 created a metropolitan district and board of excise, and required a license to be taken from this board before the expiration of the period fixed for the termination of the license issued under the act of 1857. The defendants sold liquor under the first license after the act of 1866 went into effect, and were held liable for the penalties imposed by the act. The court in that case say of licenses, that they are mere permits to do what otherwise would be an offence against a general law. Metropolitan Board of Excise v. Barrie, 34 N. Y. 657, 62 Penn. St. 491; Simmons v. State, 12 Mo. 268; Drysdale v. Pradet, 45 Miss. 445; People v. Com's. of Police, 59 N. Y. 92. And where the council of a city by their charter are authorized to grant licenses for the sale of liquors at inns, and have also full authority to levy taxes, by an ordinance passed in April, licenses were issued to certain parties to take effect on the 1st of May following. Before the 1st of May, by another ordinance, the licenses granted were revoked, and licenses were authorized to be issued to these parties upon the payment of a different tax from that imposed under the first ordinance. The action of the council was sustained. Sights v. Yarnalls, 12 Grat. 292. So, where a license to sell liquors is granted for one year, and subsequently the sale of all liquors is prohibited in the state, the license is annulled. Adams v. Hackett, 5 Gray, 597. Although liquors, the sale of which is prohibited, can not be taken in execution, they are subject to taxation as property. Dunbar v. Board of Aldermen of Boston, 101 Mass. 317. Distinguished from Ingalls v. Baker, 13 Allen, 449. If the authorities entrusted with the issuing of licenses to dealers in liquors should mistake their powers and refuse to license any one, this does not authorize persons to sell without a license. Commonwealth v. Blackington, 24 Pick. 352. In many of the cases, although a tax is imposed, the question is treated, in the opinion of the court, as one merely of police regulation, for where the tax is imposed by the state, which possesses both of these powers in its fullest extent, the cases might be treated, under either aspect, as exercises of the power of taxation, or the police power. As a further illustration of the principle that the license has none of the characteristics of a contract, the payment of the tax is made a condition precedent of the exercise of the privilege of conducting a specific calling, and where both the state and a city or a county levy this tax under these circumstances, the party can not demand his license upon the payment of the state tax, but must pay both state and city tax, he must comply with all the terms prescribed both by state and city to entitle him to pursue his calling. 12 Grat. 292; Myers v. Spencer, 49 Mo. 342. And where the statute requires a party desiring to engage in the business of a distiller to apply to the assessor of his district to assess the tax, who is to give him a certificate of the amount assessed, which is to be produced to the collector, who is to receive the taxes assessed and grant a receipt therefor written upon the certificate, which certificate and receipt constitute his license to prosecute the business of distiller, the court say "it is his duty to pay the tax for the privilege before he exercises it." And the statute authorizing the arrest of the party engaged in distilling who fails to pay the tax, if the collector shall be unable to find sufficient personal property to satisfy the taxes so assessed, the collector levied upon personal property of the party, and left it in his possession; on the day appointed for the sale, the collector finds the property in possession of a United States revenue officer, who claims it under a levy for a tax due from the party to the United States government for distilling, the levy having been made subsequent to that of the state collector. The property is sold and is only sufficient to pay the tax due the United States. The party is then arrested; it was held he was legally in custody, and the statute did not violate the provision of the bill of rights of Virginia, that no man shall "be deprived of his liberty except by the law of the land or the judgment of his peers." Commonwealth v. Bynne, 20 Grat. 165, 198.

§ 3. *License Tax on Foreign Corporations.*—As we have seen heretofore, the provisions as to equality and uniformity of taxation do not apply to corporations of other states. The doctrine on the subject is, that foreign corporations necessarily can do no act beyond the limits of the sovereignty creating them; the power of the state creating them does not extend beyond its own territory. When they exercise the powers conferred by their charter in other states, they do so by the permission of those states; and as they can act only by the permission of the state, the state may prescribe the terms on which they exercise their chartered powers. Bank of Augusta v. Earle, 13 Peters, 519; 8 Wall. 168; 10 Wall. 410, 566, 573; 100 Mass. 531; Slaughter's Case, 18 Grat. 767; 48 Ill. 172; Commonwealth v. Milton, 12 B. Monroe, 212; Tatem v. Wright, 32 Abr. 429. These foreign corporations, whether chartered

by foreign countries, or other states of the Union, are not entitled to claim the benefit of that clause of the constitution of the United States which secures to the citizens of each state all the privileges and immunities of the citizens of the several states. Corporations are not citizens in the sense of the constitution, except for the purpose of giving jurisdiction to the court. § 65, and authorities cited. The limit to the tax imposed on these corporations is the discretion of the legislature, where there is no express constitutional limitation on the subject of taxation. This view, which is the undoubted current of authority, is ably combated by Justice Beasley, as follows: "It would seem to be clear that a state can not tax, for the purpose of revenue, a foreign corporation in a mode different in principle from that in which she can tax one of her own domestic corporations. It is not denied that the corporate existence of a company is recognized, not by right but of grace, in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence except on its own conditions. The principle is universally acknowledged; hence laws requiring insurance companies and other foreign corporations to fill bonds and submit to other exactions as a prerequisite to their admission in an incorporated capacity into the state. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground their legality can not be drawn in question. But a tax law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or company on whom the tax falls as such government may deem necessary for its public wants. The act of taking the property, therefore, must of necessity be an acknowledgment of the legal status of the person or company whose property is taken. To assert that the company whose property is thus taken has no rights but such as the government taking chooses to confer, is to assert that such company has no title to its property but such as may be conceded to it by the taxing power. It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time deny such legal existence for the purpose of depriving of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of foreign corporations as a prize to the rapacity of any state in whose territories it might be, or over which it might happen to be carried." On the same principle, the general government might seize the property of all foreign corporations. *Erie Railway v. State* 31 N. J. L. (2 Vroom) 543. It is apparent that this able argument in favor of equality of taxation of foreign and domestic corporations, while it shows the injustice of discriminating in such tax, does not point out what provisions of the constitution of the state are violated. While it may be true, as a matter of principle, that taxation should be laid for the purpose of revenue, and by an equal and uniform mode, yet what shall be the subjects of taxation? The mode and the rate is in the discretion of the legislature, in the absence of express constitutional limitation on the subject of taxation, a discretion which has no limitation except that its exercise shall not abridge any of the private rights of person or property secured by the constitution. Chs. III. and IV.

§ 4. *What Occupations Licensed, and how the Tax may be Regulated.* Any occupation may be licensed and the person pursuing it required to pay a tax, but a question often arises as to what occupations are included by a particular tax law. A law imposing a tax on certain specified occupations, and "on other employments," includes lawyers. *State v. Waples*, 12 La. Ann. 343; *State v. Fellows*, Id. 344. And where the constitution allows the legislature to tax "property, merchants, peddlers and privileges," a license granted to a wholesale grocer upon the payment of a tax is included in privileges. *French v. Baker*, 4 Sneed (Tenn.) 193. A tax law provides "that any person, firm, company or corporation who desires to engage in, or carry on, any business or profession hereafter named, shall pay to the treasurer," etc. Each member of a law firm must take out a license under this act. *Jones v. Page*, 44 Ala. 657.

The legislature of Maryland imposed a license tax upon "persons keeping or exhibiting for use a billiard table or tables." A club owns and keeps a billiard table, at which members and strangers introduced by members only, play at a charge of 6 1-4 cents a game, to be paid by the member only, which charge is insufficient to defray the expenses. The club was held liable for the tax, the court saying it is in the power of the state to tax the amusements of the people, either for the purpose of revenue or as a police regulation. *Geomania v. The State*, 7 Md. 1; *Sears et al. v. West*, 1 Murphy (N. C.) 291. On the other hand, where a hotel keeper had a billiard table, kept for the amusement of his boarders, free of charge, the person giving attention to the table while others are amusing themselves was held not to be such a person as is contemplated by the constitution, which authorizes the taxing of persons "pursuing any occupation, trade or profession;" the occupation intended, like the trade or profession, must be for profit. *Tarde v. Bauseman*, 31 Texas, 377. In Pennsylvania, under a statute imposing a license tax "on all dealers in domestic goods, wares and merchandise, and on every person who keeps a store or warehouse for purpose of selling goods, etc., where he is concerned in their manufacture," the owner of a mill, near Reading, who purchases grain, as well as raises it on his farm, and retails the flour at his mill, and hauls it to Reading and other places for sale, was held liable to the license tax. *Berks Co. v. Bestolet*, 13 Penn. St. 522. In the same state under a similar act to impose a license tax upon "all dealers in American goods, wares and merchandise, and upon all persons concerned in the manufacture of such goods, wares and mer-

chandise who shall keep a store for the sale of them, except mechanics who shall keep a store or warehouse at their own shop or manufactory for the purpose of vending their own manufactures exclusively," the defendants were held not liable to the tax under the following state of facts: They were manufacturers of locomotives, tenders and component parts thereof. No engines are built to be exposed for sale, all being intended to supply orders received therefor, and none are offered for sale in the market unless companies which have ordered locomotives fail to pay for them when finished. *Norris Bros. v. Commonwealth*, 27 Penn. St. 494. *Black, J.*: "A dealer in the popular, and therefore salutary sense, is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands intermediately between the producer and the consumer, and depends for his profit, not upon the labor he bestows on his commodities, but upon the skill and foresight with which he watches the markets. A man who makes his locomotives is a mechanic." *Ib.* 494. When the legislature gave authority to the city of Boston to regulate certain employments or avocations, an ordinance requiring a license to run a hack from the centre of Boston to the centre of Roxbury, and the payment of a fee therefor, was thought to be an exercise of extra-territorial power. *Commonwealth v. Stoddard*, 2 Cush. 562. But in California a stage company carrying passengers to and from Sacramento City were held liable to a license tax by the city. *City of Sacramento v. California Stage Co.*, 12 Cal. 135. "The mere fact that the business of carrying passengers is not within the municipal limits does not make the receiving and discharging of them and contracting for them less a business in the city." A license tax on bakers may be regulated by the weight of the bread (the *Mayor v. Yuille*, 3 Ala. 137), or to auctioneers by the amount of the monthly sales. *People v. Colman*, 4 Cal. 46; *Sacramento v. Crocker*, 16 Cal. 119. A discrimination in a license tax between different localities of a city, according to supposed advantages they may present for the business for which a license is sought, but making no distinction as to persons, is a valid exercise of the taxing power; while an ordinance delegating to the city treasurer the power to fix the amount of license in each case as it arises would be invalid. *East St. Louis v. Wehmrig*, 46 Ill. 392. The fact that property used in a particular calling is taxed as property *ad valorem*, or that the income received therefrom is taxed as income, does not interfere at all with the right to impose a license tax on the calling or pursuit. *Lunt's Case*, 6 Greenleaf (Mo.) 412; *Lewellen v. Lockhart*, 21 Grat. 570; *State v. Stephens*, 4 Texas, 137; *Drexel v. Commonwealth*, 46 Penn. St. 31. The constitution of Georgia provides that "taxation on property shall be *ad valorem* only and uniform on all species of property." A tax of \$1. on each and every horse or mule offered and sold within the city, by or belonging to a horse or mule driver was held not a license tax, but a tax on property, and void because not uniform. *Livingston v. City of Albany*, 41 Ga. 21. The sixth article of the same constitution devotes to school purposes "a special tax on shows and exhibitions and on the sale of spirituous and malt liquors, which the general assembly is hereby authorized to assess." A tax was laid on the sale of whisky, brandy, etc., in quantities less than 30 gallons. This tax was held valid, although not *ad valorem* nor uniform. It was laid under art. 6, which was a special grant of taxing power not limited as to the mode. If it was not intended to be *ad valorem*, there was no necessity of the special grant. *Kenny v. Harwell*, 42 Ga. 416.

In Virginia the law imposed a tax on commission merchants, tobacco auctioneers and storagers; each business was described and a specific license tax imposed on each. Holland took out a license as a storager and also as tobacco auctioneer. He received tobacco from the grower on consignment, stored it, sold it at auction, made advances to the owner, charged him storage, an auction fee and a commission on the amount of sales, independent of his charge as auctioneer, and accounted to the consignor for the balance. It was held that he was bound to take out license as a commission merchant also and pay the tax assessed thereon. *Neal v. Commonwealth*, 21 Grat. 411. An opera company is not liable to be taxed under an act imposing a tax on theatres. *Rolan v. Kleber*, 1 Pittsby, (Pa.) Rep. 68. The license tax is not included under the head of a poll-tax. *How. & McHen*, 169. The license tax imposed by the federal government on avocations does not affect the right of the state to tax the same pursuits, or to modify, control, or prohibit them altogether. The license of the federal government is a mere receipt for taxes; it confers no authority to prosecute the pursuit; that authority is derived from the state, which, under the police power, regulates the pursuits of its people as it sees proper. *License Tax Cases*, 5 Wall. 462; *Peryear v. Commonwealth*, *Ib.* 475. And where an act of Congress undertook to regulate the sale of naphtha and illuminating oils and made the violation of the regulations a misdemeanor, it was said to be a mere police regulation, which could have no constitutional operation within the limits of the states, and was only effective where the legislative authority of Congress excludes all state legislation, as in the district of Columbia. *United States v. De Witt*, 9 Wall. 41. A state may impose a license tax on exchange and money brokers, even where their business is confined to foreign bills of exchange, and such a tax does not conflict with the power of Congress to regulate commerce. *Nathan v. Louisiana*, 8 How. 73, 80. See *Woodruff v. Parham*, Wall. 132, and *Hinson v. Scott*, 8 Wall. 148, as to discrimination as to citizens of other states. *W. H. B.*

NORFOLK, VA.

[Concluded next week.]

—THE *National Bankruptcy Register Reports* closed the thirteenth volume with the part for May 1st. Under the editorial management of Mr. O. F. Bump, the *Register* has been more than usually valuable.

Correspondence.

A POOR RULE THAT WORKS BOTH WAYS—HARSHMAN V. BATES COUNTY
—MARCY V. TOWNSHIP OF OSWEGO.

EDITORS CENTRAL LAW JOURNAL:—The two cases entitled as above, recently decided in the Supreme Court of the United States, if followed as precedents, are calculated to affect municipal bonds issued in aid of railroads, in no small degree, and with opposite results. The first is favorable to the taxpayers of the municipalities, and the latter to the bondholders. Yet, to a certain extent, both are governed by the same rule. *Harshman v. Bates County*, 3 CENT. L. J. 367, construes the 14th section of article 11, Constitution of Missouri, 1865, which declares that, "the general assembly shall not authorize any county, city or town, to become a stockholder in, or loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." By an act of the state legislature (Acts 1868, 92), it was provided that upon the petition of twenty-five resident taxpayers of any municipal township in any county of the state, desiring that a subscription to the stock of a railroad company be made on behalf of such township, it should be the duty of the county court of such county to order an election to be held in such township to determine whether such subscription should be made. And if it appeared from the returns of such election that not less than two-thirds of the qualified voters of such township voting at such election were in favor of such subscription, then the county court should make the subscription on behalf of the township. Under this act, and according to its provisions, a subscription was made by Bates county on behalf of Mt. Pleasant township, to the capital stock of the Lexington, Lake & Gulf Railroad Company. The bonds were issued, and in due time suit was brought by one of the holders of the bonds for accrued interest. The defence was that the constitutional restriction applied to townships the same as to counties, cities and towns, and that the election conforming to the requirement of the act of the legislature, as to the number of the qualified voters whose assent should be obtained, and not conforming to the constitutional requirement of two-thirds of the qualified voters of the township, conferred no authority upon the county court to make the subscription, and the bonds were therefore void, even in the hands of a *bona fide* holder for value. The defence was held good.

In *Marcy v. Township of Oswego*, 3 CENT. L. J. 389, the defence was that the restrictions of an act of the legislature of Kansas, (Laws of Kansas, 1870, p. 189), had been disregarded by the county commissioners, in issuing the bonds sued on for a larger amount than was authorized by the act, that is, for an amount that would require a tax levy of more than one per cent. per annum on the real estate of the township. In this case there seems to have been no dispute about the facts, but the court held that the county commissioners had by implication been clothed with discretionary power to determine whether the bonds to be issued would require a levy in excess of this amount, and the fact that they were issued under the provisions of said act amounted to a declaration that the law had been complied with, and the township in defending against the bonds could not go back of the action of the commissioners, to enquire whether they had exceeded the authority conferred upon them by law.

In the Bates county case, the court does not go to the length of declaring that even if the assent of two-thirds of the qualified electors had been obtained, still the bonds would be void, but this conclusion might follow from an application of the rule in the Oswego township case. If the law required simply the assent of two-thirds of those voting at the election, the returns show that two-thirds of those voting assented, and the bonds recite that the same are issued in pursuance of the statute, the question as to the number of electors assenting is judicially determined, and is no longer open to enquiry. If the defendant is precluded from setting up a state of facts in conflict with the law, and the finding of the county officers in the one instance, surely the plaintiff, the *bona fide* holder of the bonds, would be held to a reliance upon the validity of the statute, and the compliance with its terms expressed upon the face of the bonds, notwithstanding he might be able to prove that, as matter of fact, the number of electors required by the constitution actually assented to the subscription, at an election held for that purpose. The defendant township is bound by the action of the county officers, over whose selection or official conduct it has no control, and, therefore, the plaintiff bondholders in the other case should be bound by the same rule.

The supreme court has not always been inclined to extend this extraordinary protection to negotiable paper, but has held in *The Floyd Acceptance Cases*, 7 Wall. 666, in *Marsh v. Fulton County*, 10 Wall. 676, and by approval of the last mentioned case, in *Nugent v. Supervisors*, 19 Wall. 241, that holders of such paper were not protected, when there was a want of authority in the agent to issue it; that the holders of municipal bonds were bound to look to the action of the officers of the municipality, and ascertain whether the law had been so far followed as to justify the issue of the bonds.

In the case of *Commissioners of Knox County v. Aspinwall*, 21 How. 544, it had been previously held, as in the recent case of *Oswego township*, that the commissioners being authorized to issue the bonds, after obtaining the assent of a majority of the voters of the county, were thereby empowered to determine when such assent had been given, and the county was irrevocably bound by their decision, and in a suit by *bona fide* holders of the bonds was estopped from questioning the fact whether there had been a favorable vote at an election, or not. The question in the *Fulton county* case was, what subscription had been au-

thorized by the vote, and there was no attempt to invoke the aid of the *Knox county* case, nor was it intimated that the action of the officers in making the subscription raised a conclusive presumption that the authority had been conferred by a popular vote. It was also held that the vote at an election was necessary to confer the authority. The case of *Oswego township* is even stronger against the municipality than that of *Knox county*, for the reason that in the former the subscription was made for the township to be bound, by the officers of the county, and in the latter, the county officers were acting for the county. Besides, in the one case, the authority depended upon a fact that was a matter of record in the county, and in the other, upon a matter to be determined, at least *prima facie*, by the returning officer of the election.

By the *Oswego township* case, negotiable municipal bonds are protected against payers who are more passive, ignorant and helpless than the holders themselves. While, by the authority of the *Bates county* case, and the application of the rule laid down in the *Knox county* and *Oswego township* cases together, bonds of the same class are to be discredited in the hands of innocent purchasers, by the interposition of an act of the legislature too lax in its provisions, even when there has been a compliance with the more rigorous provisions of the constitution by the voters of the municipality.

W. F. W.

ST. LOUIS, June 30, 1876.

Book Notices.

DILLON'S CIRCUIT COURT REPORTS, VOLUME 3. Cases Determined in the United States Circuit Courts for the Eighth Circuit. Reported by JOHN F. DILLON, the Circuit Judge. Volume 3. Davenport, Iowa: Day, Egbert & Fidler. 1876.

Excepting the reports of the decisions of the Supreme Court of the United States, we are confident that there are no federal court reports which are held in higher esteem by the profession throughout the country than those of the eighth circuit. To make an acceptable collection of reports of judicial decisions, two things must concur: a good court and a good reporter. This truth is perhaps as conspicuously illustrated by Johnson's reports as by any series of American reports extant. The series under consideration furnishes also an illustration perhaps equally strong.

Hon. Samuel F. Miller, the supreme court justice assigned to the eighth circuit, certainly has no superior among the eminent names which adorn the great bench of which he is a member, and is believed by many to have no equal upon it. Other minds, indeed, may surpass his in the hoarding of mere case law; but in the solid learning of the law—a knowledge of the principles upon which justice is administered, with all their boundaries, ramifications and exceptions—he yields to no living jurist. His vigorous and incisive methods of reasoning, which rarely fail to reach both the law and the justice of the case, bear a strong resemblance to those of Lord Mansfield. Such vigor of mind is rarely found to co-exist with an indolent temperament; and Mr. Justice Miller works with an honest industry which makes him a great acquisition to a court with an overcrowded docket.

It would almost be superfluous to speak of the merits of a judge as well known and as much admired as Judge Dillon. From his youth up, he has been wedded to the law, and almost from his youth he has sat continuously on the judicial bench. He was a district judge in Iowa at twenty-seven; at thirty-two he was called from the district bench to the supreme bench of his state, and at thirty-eight he was called to his present position. These eighteen years of continued judicial service, reaching back to a period in life anterior to that at which one's mental habits usually become fixed, have sufficed to develop in him, in an eminent degree, what is known as the *judicial habit*. This habit is nothing more than a uniform expression of the love of justice. It guarantees to every suitor a full and fair hearing, and does not decide his cause without a patient and attentive examination of its merits and of the legal grounds on which it is claimed to rest. We could not give a better illustration of what the *judicial habit* is than by suggesting what it is not. Some judges, who succeed to the bench after the better part of a lifetime spent in advocacy, are never able to throw off the habits of the advocate. As soon as the facts of a case are stated, they involuntarily take sides with the one party or the other, and the counsel on the unfortunate side soon find themselves laboring under the disadvantage of arguing against the prejudices of the court. A judge who thus decides a case before hearing it is not possessed of the *judicial habit*. We do not mean to say that a judge should feel obliged to hold his judgment in abeyance until the argument is completed. He must and will begin to reason upon the law of the case as soon as the facts are stated. It must also be confessed that many foolish controversies are brought before judges for their decision, as to which the most conscientious judge is obliged to come to a conclusion as soon as the facts are stated. Nor do we mean to say that in doubtful cases counsel should be allowed to argue *ad libitum* without being interrupted by the court. It is always proper for a judge to suggest his doubts to counsel, and obtain any light which counsel may be able to shed upon them; but this should be done in such a way as not to impress the counselor with the belief that his case has already been decided against him. In other words, the just judge—the judge who is possessed of the *judicial habit*—in most cases doubts, and when he expresses a doubt to counsel, counsel feel that it is merely a doubt, and not a decision.

But the most conscientious judge will feel himself bound, by the circumstances which surround his position, to set bounds to his doubts, and to limit the time which will be permitted to counsel for the argument of even the most important questions. He will be obliged at times to reach a result, if it is only a guess, and to cut off the argument of one

cause rather than to postpone justice to all the suitors in his court. We mean to say that it is possible for a judge to possess too much of the judicial temperament; and of this the bench has furnished conspicuous examples. To Lord Chancellor Eldon is attributed the glory of never having been reversed but twice by the House of Lords during the many years in which he held the seals, and in both of those cases he is said to have concurred in reversing his own judgments. But this exceptional freedom from error was attained at the expense of protracting litigation to an extent which is scarcely tolerable. So that now, after half a century, an old chancery suit has come to light in England which was begun before our revolution, and the greatest marvel of the English bar is that Lord Eldon had nothing to do with prolonging its existence.

Judge Dillon combines in a rare degree this judicial temperament with the habit of dispatching business. This is in a great measure owing to his exceptional power of concentrated and continued work—a power which is so great as to be a source of constant wonderment to the bar, and to give rise to the frequent prediction that unless he relaxes in a systematic manner the excessive strain, his great strength will suddenly give way, and a most brilliant and useful judicial career will come to an untimely end. Outraged Nature will assert her rights, and there never lived a man who could permanently make himself an exception to her inexorable laws. We take the liberty to suggest that Judge Dillon should pay the debt which he owes to his profession and his country, *at annual rests*, the mode in which debtors are usually required to pay interest; otherwise, like the unfortunate debtor who has agreed to pay compound interest, he may too soon find himself unable to discharge even the principal.

These two eminent judges fortunately find their labors assisted by an able and diligent corps of district judges. These are, Hon. Rensselaer K. Nelson, for Minnesota; Hon. James M. Love, for Iowa; Hon. Samuel Treat, for the Eastern District of Missouri; Hon. Arnold Krekel, for the Western District of Missouri; Hon. Elmer S. Dundy, for Nebraska; Hon. G. C. Foster, for Kansas; Hon. Henry C. Caldwell, for the Eastern District of Arkansas, and Hon. Isaac C. Parker, for the Western District of Arkansas. At the risk of being thought partial, we will venture to single out from this list three names as deserving of especial mention.

Judge Love, the oldest in commission of the district judges in the eighth circuit, enjoys in a high degree the confidence and esteem of the bar of Iowa. His conception of the duties of his office is such that he does not write many opinions. In this, we venture to suggest, he is mistaken. A well-reasoned opinion from an inferior court is frequently of the greatest service to the appellate tribunal in finally determining the cause. It is known to be the frequent practice of the English court of appeals to affirm the judgment of the court below on the strength of the reasoning contained in the opinion of such court, which opinion, unless we are mistaken, is, when in writing, always sent up with the record, and always considered by the higher court. We understand the practice of the Supreme Court of the United States to be different. We do not recollect a case, even of the many that have gone up from this circuit and which have been affirmed, and in which the circuit judge has written and published an opinion, in which such opinion is even referred to by the court of last resort. Dillon, the author, is constantly quoted from that bench; but we do not recall an instance where any of the judges have condescended to notice the opinion of Dillon the judge, in the case before them, although his judgments are in nearly all cases affirmed. We can not but think that a change in this particular would be advantageous, not only to the judges of the supreme court themselves, but also to the administration of justice. It would encourage the circuit judges and the district judges sitting in the circuit courts to a more thorough examination of the law of those causes which are liable to be taken to the supreme court, and would thus in effect enable the justices of the supreme court to distribute a portion of their labors among the judges sitting in the courts below.

Hon. Samuel Treat, the district judge whose station is at Saint Louis, is also deserving of particular mention. In date of commission he ranks next below Judge Love; but he has probably seen a much longer term of continuous judicial service. Judge Treat has now been on the bench continuously for about twenty-seven years. If we mistake not, he was first appointed to the bench as Judge of the St. Louis Court of Common Pleas, in place of Montgomery Blair, who resigned on account of the inadequacy of the salary. At the succeeding election, Judge Blair was a candidate, but was defeated by Judge Treat before the people. If we mistake not, the celebrated *Dred Scott* case went up from Judge Treat's court. During his long period of service on the federal bench, he has done more, perhaps, than any other one judge in settling the law relating to our vast river marine. His knowledge of our complicated and bungling bankrupt act is not second to that of any judge, not excepting Judge Blatchford.

Judge Caldwell is one of the younger members of the bench of the eighth circuit. In 1864, when Colonel of the 3d Iowa Cavalry, he got out of the saddle and ascended the bench on which he now presides so well. Many of the federal judicial appointments of that period were, to say the least, injudicious. Among those appointees, four at least, Underwood, Busted, Durell and Story, have, justly or unjustly, we shall not say which, passed under a cloud which will overshadow their names forever. But Judge Caldwell remains where he has stood for twelve years, like a rock in a stormy sea, surrounded with a whirlwind of public and private corruption, beat against on every side by mad waves of party passion, his reputation untarnished, but growing brighter and brighter as the roaring of the waves subsides and as the sky becomes more serene. The storm, as it dies away, reveals many wrecks behind, but he is not one of them. He enjoys in a high degree the confidence of a critical

and exacting bar; and his twelve years of judicial service illustrate the fact that we have as yet reached no stage of American life in which a judge who keeps within his jurisdiction, who attends to his business, and who keeps his conscience clean, will fail of the confidence of the bar and the people. Judge Caldwell recently held a brief term of court at Saint Louis, and while he was here, he succeeded in dispatching a great deal of important business to the high satisfaction of the bar. He did this by no other method than by the application of plain common sense and simple business principles to the work before him. We believe he writes no opinions. We wish he did; for, if he writes as well as he talks, we are satisfied his opinions would command the attention of the profession. He is one of the few judges of our acquaintance whose mind has not begun to stiffen under the effects of hard service. He talks a great deal, and never without saying something worth listening to.

We have spoken of only one element of a good series of reports, namely, of a good court. The other necessary element which we have suggested is a good reporter. We have shown that the decisions collected in the volume before us are those of a good court—a court entitled to the confidence and respect of the whole country. We are equally clear that these decisions possess the additional merit of being unusually well reported. Ordinarily a judge who hears the argument of a cause and who participates in the decision of it, as is the case with most of the cases in this volume, is better qualified to report the decision than another person. But Judge Dillon has added to his high reputation as a judge the distinction of being one of the foremost legal authors of our language. This of itself would give an assurance that his reporting is well done, if anything were needed to give it. But it is unnecessary to enlarge upon this point; for none of our readers are unfamiliar with his style of reporting. All of his decisions which have appeared in this journal since its foundation, have, with few exceptions, been reported by himself.

The one hundred and thirty-six cases comprised in this volume extend over a period of two years, coming down to a very recent date. They embrace what may be termed the *cream* of the labors of Judge Dillon and his associates during that time. We do not detect among them a single case which appears unworthy a place in a first class volume of reports. A feature which deserves special mention is the copious notes which the great industry of Judge Dillon has enabled him to append to many of the decisions. Judge Dillon abominates long opinions, and never writes long ones, except in cases where it is clearly necessary. Where a case is not directly in point as a precedent, he wisely prefers to refer to it in a note, rather than increase the length and destroy the symmetry of the opinion by placing it there.

We have not space at this time to refer in detail to the many important questions which we find decided in this volume. Several of these cases are *leading* cases, the principles arising in them having been here passed upon for the first time. To this class we would refer several decisions on the law of Bankruptcy, Taxation, Municipal Bonds, Criminal Law, and particularly that branch of the criminal law which relates to conspiracies.

The increase of the appellate jurisdiction of the Supreme Court of the United States over the amount in controversy to five thousand dollars, adds to the importance of the decisions of the federal circuit courts, most of which are necessarily final. This renders the reports of these courts indispensable to every well-furnished library, and there are none among them more deserving of the attention of the profession than those of the Eighth Circuit.

A SERIES OF ESSAYS ON LEGAL TOPICS. By JAMES PARSONS, Esq., Professor in the Law Department of the University of Pennsylvania, Philadelphia. Rees Welsh, publisher, 1876.

This work embraces the introductory lecture of the author on "Law as a Science," and six essays on very interesting legal questions. They were originally contributed to the *Law Magazine and Review* of London, being reviews of standard English works on the following subjects: Parties to an Action, The Statute of Frauds, A Use upon a Use, The Preservation of the Common Law, and Accord and Satisfaction. The concluding one is a review of Coulange's "Religions, Laws and Institutions of Greece and Rome," and a pleasing and instructive essay on the civil law. The book, without rising to the rank of positive authority, is a worthy addition to legal literature, and embodies a large amount of valuable information to the student, as well as the practitioner. The style is flowing and felicitous, the type large and clear, and it is altogether one of those books it is pleasant to fall in with.

Recent Reports.

REPORTS OF ADMIRALTY AND REVENUE CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE WESTERN LAKE AND RIVER DISTRICTS, BY HENRY B. BROWN, District Judge, Eastern District of Michigan. Vol. I. New York: Baker, Voorhis & Co.

This is a volume of five hundred and ninety pages and contains nearly one hundred decisions in admiralty, and cases under the revenue law. It covers a period of almost twenty years, and is designed as a continuation of the compilation of Mr. Newberry. In selecting decisions for this volume the compiler has, very properly, omitted any coming under the following five heads: (1) cases turning solely upon questions of fact, (2) cases reversed, (3) cases affirmed by the supreme court and elsewhere reported, (4) cases announcing principles of law already well settled, and (5) cases reported in other volumes.

In looking over the pages, we come upon the following decisions in

maritime law. The clerk of a steamer is a mariner and entitled to a lien for wages. *The Sultana*, p. 13. There is no lien for wharfage. *The Gem*, p. 37. Want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien. It exists by virtue of the general maritime law, it follows the ship wherever she goes, and may be enforced wherever there is jurisdiction to enforce it. *The Champion*, p. 520. A maritime lien exists for moneys advanced to purchase or pay for necessities supplied to a ship, wherever it would exist for the necessities themselves. *The Union Express*, p. 537. In this case it is also held that parties may stipulate for a lien for necessities, notwithstanding that no such lien is implied by the law of the place where such necessities are furnished. In the case of *The St. Joseph*, p. 202, the court laid down the rule of priority of different claims in the following order: Maritime liens; liens given by state laws; mortgage liens; the right of the assignee in bankruptcy. In the preface to the volume the reporter makes a suggestion which is worthy of consideration. His suggestion is that cases determined by the federal courts, instead of being reported by districts, should be reported by classes, or, in other words, each volume be devoted to a particular branch of law, as patent law, admiralty, bankruptcy, or criminal cases. An admiralty practitioner would not then be required to purchase a volume to obtain a dozen decisions in admiralty, and a lawyer who makes bankruptcy a specialty, would not have to cumber the shelves of his library with admiralty or patent law precedents.

FIRST DELAWARE CHANCERY REPORTS. Reports of Cases Adjudged and Determined in the Court of Chancery of the State of Delaware under Authority of the General Assembly, by DANIEL M. BATES, Late Chancellor. Volume 1. Philadelphia: T. and J. W. Johnson & Co. 1876.

On the 29th of March, 1871, the general assembly of Delaware adopted a resolution directing the chancellor to "collect and publish such equity cases, heretofore determined in the court of chancery of that state, as, in his judgment, shall be proper for public information," and this volume is the result. The decisions as well as the arguments of counsel were made up by one of the late chancellors, from the manuscript notes of the chancellors, and embrace the remote period from 1814 to 1833, and the authorities cited in the earliest cases are of course almost entirely from the old English books. Many of the decisions are clear and perspicuous, and this volume, and those which are to follow it, will be interesting and not without value to the profession. At the conclusion are sketches of the lives of those early chancellors, and from these we learn that the court was established in 1792, but no record of cases was made until 1814, at which time the volume commenced. Among the names of attorneys and litigants are many of historic interest and revolutionary fame.

Notes of Recent Decisions.

Contract to Construct House—Changes made during Construction—Measure of Recovery.—*Goldsmith v. Hand*. Supreme Court of Ohio. 3 Am. Law Times, 93. Opinion by Gilmore, J. Where a contractor, under a written agreement between them, constructed a house for and on the lands of the owner, substantially in accordance with the terms of the contracts, as verbally changed in some respects as to size, form and material of some parts of the work, by consent of parties during the progress of the work, and leaving little only to be done to complete it; and the owner, during the progress of the work, had, without objection, made payments in pursuance of his agreement as designated portions of the work were done, and had taken possession and was using the house for the purposes intended; in an action brought to recover a balance due on the contract: *Held*, 1, that the plaintiff might recover without proving that the contractor had strictly performed the contract. 2. That as to unfinished work, the plaintiff was entitled to recover the balance due at the contract price, less such sum as it would require to construct or complete the unfinished parts. 3. That as to those parts which, by consent of both parties, during the progress of the work, had been constructed of materials and of size and form different from that required by the agreement, the plaintiff was entitled to recover the balance due at the contract price, less the difference in the value of those parts as constructed, and their value as the contract required them to be constructed.

Attachment—Bankruptcy—Construction of Sections 14, 35, and 39 of the Bankrupt Act of 1867.—*Henkelman v. Smith*. Court of Appeals of Maryland. 3 Am. Law Times Rep. 283. Opinion by Grayson, J. The failure of the defendant to appear and defend an attachment against his property is no evidence of his having done any act to procure the attachment within the meaning of section 35 of the bankrupt act of 1867, or to procure or suffer his property to be taken under legal process within the meaning of section 39 of said act. Section 14 of the bankrupt act refers and can only refer to attachments which are pending at the time the petition in bankruptcy is filed, and not to such as have been prosecuted to a judgment prior to the filing of such petition. The attachment having been properly issued and prosecuted to judgment, that judgment is final, imports absolute verity, is conclusive with respect to the subject-matter adjudicated and can not be re-examined or impeached in a collateral proceeding.

Liability of Corporation for Wilful Acts of its Agents.—Damages.—*McKinley v. Chicago & N. W. R. R.* Supreme Court of Iowa. 3 Am. Law Times Rep. 279. Opinion by Cole, J. In an action against a corporation for the wilful acts of its servant, done in the

course of his employment, and in the discharge of his duty, the corporation is liable for actual damages only. For all exemplary damages the servant alone is liable, unless he is authorized by the officers of the corporation to commit the wrongful act or his act is ratified or approved by them. Actual and exemplary damages distinguished.

Mechanic's Lien—Release.—*Phillips v. Gilbert et al.* Supreme Court Dist. of Columbia. 3 Wash. Law Rep. 137. Opinion by Wyllie, J. A mechanic who has filed a lien upon certain real estate for work and materials furnished in the erection of houses thereon, and releases it for the purpose of enabling the owner to secure a new loan, can not afterward claim to enforce the same lien as against the party making such loan upon the security of the property.

Action by Wife for Selling Liquor to Husband—Settling With One of Several—Separate Action.—*Jewett v. Wanshura*. Supreme Court of Iowa. 8 Chicago Leg. News, 324. Opinion by Day, J. 1. Section 1557 of the Iowa Act gives a remedy for injuries caused by the sale of intoxicating liquor. Section 1539 classes wine and beer as intoxicating liquors, when sold to a person intoxicated, or in the habit of getting intoxicated; hence, section 1557 gives a remedy for injuries caused by such sales of wine or beer. 2. When the drunkenness complained of consists not of a single fit of intoxication, contributed to by two or more, the action is not joint but several, and each is only liable for the injuries produced by his own acts; and in such a case, settling with one does not release the other. 3. The plaintiff's husband was an habitual drunkard; the plaintiff forbade the sale of liquor to her husband, and a day or two after, it is claimed, she came to the saloon in company with her husband, and in his presence, as defendant claims, directed him to sell her husband all the liquor he wanted. The only reasonable inference from such conduct is, that the act of plaintiff was under coercion or restraint, and the jury had a right to find from the testimony, that defendant drew the reasonable inference from the facts which he knew, and hence that he had knowledge that the plaintiff did not act voluntarily.

Bankrupt—Landlord and Tenant.—*In re Commercial Bulletin Co.* United States Circuit Court, District of Louisiana. 1 Louisiana Law Journal, 176. Opinion by Bradley, Circuit Justice. Neither the bankrupt nor the assignee can claim to occupy the leased premises after the bankruptcy, without paying the rent in full; and they are liable personally for the same.

Contract—Forbearance—Consideration—Proof of Agency.—*Shaneman v. Core*. Supreme Court of Pennsylvania. 6 Pittsburgh Leg. Journal, 176. 1. A promise to forbear suing upon a sealed instrument, if without consideration, does not reduce the contract from a specialty to a parol contract. 2. S., having agreed, under seal, to pay C. \$1,000 in ninety days, when the day of payment approached, made a request for time, which C. granted; there was no consideration for this promise; five years afterwards this action was brought. *Held*, that covenant was the proper form.

Receiver and Assignee.—*Myer et al. v. Chrystal Preserving Works*. Circuit Court of Illinois. 14 Nat. Bank Register, 9. Opinion by Williams, J. If a receiver is appointed by a state court, in a suit by stockholders against the corporation, the court will not, at the instance of creditors, on the subsequent bankruptcy of the corporation, discharge the receiver and turn the property over to the assignee.

Purchaser in Good Faith—Unrecorded Quit-Claim Deed—Subsequent Quit-Claim Deed—What Title it Conveys.—*Grees v. Evans et al.* Supreme Court of Dakota. 8 Chicago Legal News, 333. Opinion by Bennett, J. 1. In order to defeat a title under a prior unrecorded deed, the subsequent purchase must be in good faith, without notice, and for a valuable consideration. 2. The owner of a lot of land executed a quit-claim deed of it to a party in good faith; after the execution and delivery of this deed, and before it was recorded, he made another quit-claim deed of the same land to another party, conveying all his interest in the land, with covenants against the acts of the grantor, which deed was recorded first. *Held*, that the grantor by the first deed, as between the parties, passed all the interest he had in the land, and this, although it was not recorded; that the grantee in the second deed only took the interest which the grantor had in the land at the time of the execution of the deed, and having conveyed it away, he had no interest in the land to pass by the second deed; that the covenant against the acts of the grantor, in the second deed, did not affect the result in this particular.

Property taken by Virtue of the Revenue Law not Replevinable.—*Brice et al. v. Elliot*. United States Circuit Court, Ohio. 8 Chicago Leg. News, 322. Opinion by McKennan, J. Property taken or distrained under the authority of the revenue law is irreplevinable, and the form of action of replevin is taken away from persons claiming property so taken or distrained. Citing, Revised Statutes, §§ 934, 3224; Purdon's Dig. 1226, § 4; O'Reilly v. Good, 42 Barb. 521; Delaware R. R. v. Prettyman, 17 Int. Rev. Rec. 101; Pullan v. Kinsinger, 11 Int. Rev. Rec. 197; Stiles v. Griffith, 3 Yeates, 83; Pott v. Old Wine, 7 Watts, 173.

What Constitutes Swamp Land.—*Keller v. Brickey*. Supreme Court of Illinois. 3 West. Jurist, 176. Opinion by Breece, J. It is not necessary that land should be overflowed annually to make it swamp land, under the act of Congress donating "swamp and overflowed" land to Arkansas and other states. From the passage of that act, such lands became the absolute property of the state. The opinion follows Railroad v. Smith, 9 Wallace, 96, and overrules Thompson v. Prince, 67 Ill. 281.

Boundaries of Land Bordering on a Non-navigable Lake.—*Forsyth, et al. v. Small, et al.* United States Circuit Court, District of Indiana. 8 Chicago Leg. News, 322. Opinion by Drummond, J. The law upon the subject of the survey of land bordering upon navigable and non-navigable streams, is that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the centre of the stream. Where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the government did not intend to exclude from the operation of the grant made to the purchaser any land between the meander line and the water.

Legal Money—Set-off—Partnership—Damages.—*Wright v. Jacobs.* Supreme Court of Missouri. 3 Western Jurist, 146. Opinion by Wagner, C. J. 1. In making contracts gold may be used as a commodity, and estimated according to its intrinsic value; but in the absence of a special agreement, debts may be paid and contracts discharged in anything that is made legal money. 2. In an action at law, defendant can only plead such claims as will sustain an action at law. Thus, in case of an unsettled partnership, where one member sues another on a promissory note having no connection with the partnership, defendant can not set up by way of counterclaim, his payment of his co-partner's share of the debt. 3. An instruction is improper which permits the jury to give a verdict for a greater sum than that asked by the pleadings. The following note is appended to this case by the learned editor: "The question of gold payments was the subject of much litigation during our transition from coin to a paper money circulation; and in the event of our return to specie payments, there will probably be more litigation on the same subject. Soon after the passage of the 'Legal Tender Act' by Congress, the Supreme Court of the United States held in the case of *Hepburn v. Griswold*, 8 Wallace, 603, that the United States treasury notes were not a legal tender for debts contracted prior to its passage. But in the great 'Legal Tender Cases,' 12 Wallace, 457, the former decision was overruled, and the legal tender act held valid, and applicable both to debts contracted before and after its passage. But the legal tender act had a narrow escape; the chief justice and three of his associates dissented. Many thought to overcome the effect of the act by stipulating in their contracts in express terms, that the payment should be 'in gold.' But as the courts, as a rule, can only give damages where a personal contract is broken, they were at last compelled to take as payment damages in dollars of legal tender notes. The courts had no power to enforce a specific performance of the contract. In *Illinois*, suit was brought on the following note: 'I promise to pay Thomas Colley, one hundred and fifty dollars with ten per cent. interest from date, in gold. July 17, 1862.' The supreme court, in passing upon the case, *Whetstone v. Colley*, 36 Ill. 328, held that a judgment on such a note could only be for a certain number of dollars, without regard to the medium in which the same were to be paid. It has been a matter of surprise how a coin circulation has been maintained in California, where, as in all other parts of the United States, paper currency is a legal tender. But in the early part of 1863, the legislature of that state passed what was termed the 'Specific Contract Law.' This act provided that all contracts should be performed specifically as agreed, and should be paid in the medium specified in the contract; that the judgment and execution should state the medium of payment, and that the sheriff should receive nothing but that kind of money, either from the debtor, or from purchasers of the debtor's property. The Supreme Court of California in 25 Cal. 564, held that this act was not in violation of the legal tender act. Without such an enabling act extending the common law rules, it seems that an express promise to pay dollars in gold or silver may be paid in legal tender notes. But it also seems that if the coin is described as *chattels* instead of *dollars*, or if there is an express contract to pay the difference between the current value of coin and paper currency, the measure of damage, in case of a breach of contract, would be the market value of the coin at the time the contract was broken.

Legal News and Notes.

—THE constitution of Colorado has been adopted by a large majority, and the centennial state enters the Union.

—THE *Baltimore Sun* says that on the occasion of the visit of Dom Pedre to the supreme court chamber in Washington, recently, he was conversing in an audible tone with the Brazilian minister, while Justice Miller was reading an opinion. The marshal of the court rapped and commanded silence, and Justice Miller, not knowing who the offender was, suspended his reading and remarked sternly: "We allow but one to talk here at a time." The emperor was quite discomfited, became silent at once, and as soon as he recovered his equanimity left.

—THE WHISKY PROSECUTION.—The prosecution of the whisky ring, which was begun in May, 1875, has resulted thus far as follows: Value of property seized, \$1,500,000; assessments, \$1,400,000; suits on official bonds, \$250,000. There has been turned into the treasury \$600,000. There have been indicted 95 distillers and agents, 2 supervisors, 5 revenue agents, 2 collectors, 8 deputy collectors, 80 gaugers, 15 storekeepers, and 19 other persons. There have been 110 convictions, and 17 acquittals.

—BAGGAGE RECEIPTS.—Philip A. Madan arrived in this city on the New York and New Haven Railroad, gave the checks for his baggage, while in the train, to the agent of the New Transfer Company, at the same time receiving a receipt on which was a printed clause whereby the company limited its liability to \$100 for loss of baggage, unless a special contract was made to the contrary. It was then dark, and Mr. Madan put the receipt in his pocket without looking at it. The baggage was stolen, and Mr. Madan sued for \$415. On the trial, the company set up the receipt as a binding contract, limiting their liability to \$100. Judge Sedgwick charged the jury that it was for them to determine whether Mr. Madan could see enough of the paper to indicate that it was a contract, and not a receipt, and the jury gave Mr. Madan \$415.—[*New York Sun*.]

—A CURIOUS suit will be tried in the Superior Court of Massachusetts at its October term. Elisha P. Hollis, an insurance agent of Natick, Mass., was ordered by the North British and Mercantile Ins. Co., in the fall of 1873, to cancel certain policies of theirs by him issued. He did not do so, and the fire of January 14th, 1874, burned up the risks. Now the company brings suit for recovery of damages, and Hollis sets up the strange defence "that, after the Boston fire, November, 1872, and during 1873, the cares, duties, perplexities, and labor growing out of said fire in connection with his business as an insurance agent, his mental powers gradually, but imperceptibly to him, gave way, so that he was mentally deranged and unfit for the transaction of business." He says further that "at the time named in the complaint, he was of unsound mind and insane, and not responsible for his action and not accountable for his action in the premises."

—AMONG the questions which have arisen out of the late decision of the supreme court in regard to township railway bonds in Western Missouri, is whether the decision does or does not involve the validity of the St. Joseph bridge bonds. The bonds were issued under the city charter provisions, which authorize the issue of such evidences of municipal indebtedness on the approval of two-thirds the number of voters voting on the proposition. It is claimed that this provision of the charter is in conflict with that clause in the state constitution which requires the assent of two thirds of the whole number of qualified voters in the city. But another fact connected with the issue of these bonds is that they were not issued by the city council voluntarily after they had been voted upon; but only after a writ of *mandamus* had been served upon its members by the state supreme court. It is now asked what influence this interference of the highest court of the state will have in establishing the validity of the bonds.

—IN the Superior Court of Boston, Mass., the case of *Wood v. Fireman's Ins. Co.*, has just been decided. It was one of several actions brought by the plaintiff against insurance companies on policies, whereby the plaintiff was insured to the amount of 22,600 on the furniture of his house at Lexington, and on several paintings. The principal subject of the insurance was a painting called "Christ Crowned with Thorns," insured for \$15,000, and the defendant claimed that the policies were void on account of false and fraudulent representations as to the value of the above named painting. The plaintiff's house was destroyed by fire February 4, 1875. At the trial, the defendants offered evidence that the plaintiff effected insurance through a broker, and represented that the painting was a copy from an original by Leonardo da Vinci, that the original was in the Vatican, or one of the churches of Rome, and of the value of \$1,000,000, and that this was the only copy in this country, and that no other copy could ever be allowed to be made, and that the value of the painting was \$30,000, and that the defendant issued the policy relying upon these representations as true. Evidence was introduced by both parties as to the truth of the representations, and whether they were made, as to the value of the painting. The jury returned a verdict for the defendant.

—THE Queen of England's new title is causing not a little trouble among litigants in the courts, and perplexing the judges generally. In a late case before Vice-Chancellor Hall, *Bacon v. Taylor*, an action in which two of the principal defendants resided in Germany, the plaintiff applied for leave to issue a writ to be served out of the jurisdiction, and also asked that it should be in proper form, but what that form should be he wished the court to say. His counsel referred to the royal proclamation, which declares "that henceforth, so far as conveniently may be, on all occasions, and in all instruments wherein our style and titles are used, save and except all charters, commissions letters patent, grants, writs, appointments and other like instruments, not extending in their operation beyond the United Kingdom," the words "Empress of India" should be added to the royal style and titles. The learned counsel also referred to the answer returned by the attorney-general to a question put by Mr. Osborne Morgan, Q.C., M.P., in the House of Commons, that "in respect of all instruments, it will be for the authority issuing them to decide whether the addition of 'empress' can be conveniently dispensed with;" and he asked the court, while giving leave for the issue and service of this writ upon these defendants, as its operation would extend "beyond the United Kingdom," to decide whether the addition of the words, "empress of India" should be made in the writ to the style and title of "Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith," with which such writs have hitherto commenced. The vice-chancellor did not wish to take the responsibility of deciding the question, and referred the plaintiff to the clerk of records and writs. But the plaintiff could get no satisfaction there, and so returned once more to the court. The vice-chancellor again gave it up, and at last accounts the plaintiff was in search of the lord chancellor.